Supreme Court, U.S.
FILED
SEP 13 2006
OFFICE OF THE CLERK

No. 06-371

In The

Supreme Court of the United States

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA,

Petitioner,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE, in his Official Capacity as the COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

PETITION FOR A WRIT OF CERTIORARI

KARL E. ROBINSON
(*Counsel of Record*)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street,
Suite 3500
Minneapolis, MN 55402-4629
Telephone: (612) 604-6400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a state tax imposed on only those products made by parties who refuse to surrender their First Amendment rights while exempting identical products made by parties who surrender such rights violates the First Amendment.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding are Petitioner Council of Independent Tobacco Manufacturers of America and Respondents the State of Minnesota and Dan Salomone, the Commissioner of the Minnesota Department of Revenue. In addition, in the proceedings below Carolina Tobacco Company and Winner Tobacco Wholesale, Inc. were plaintiffs and appellants. Carolina Tobacco Company and Winner Tobacco Wholesale, Inc., however, are not parties to this Petition for a Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT

Petitioner Council of Independent Tobacco Manufacturers of America is a Virginia non-stock corporation, which is an association of small, independent tobacco manufacturers located throughout the United States. Petitioner has no parent corporation and no publicly held company owns 10% or more of the Petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS AND ORDERS ENTERED IN THE CASE	1
BASIS FOR SUPREME COURT JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
I. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE ACT VIOLATES THE FIRST AMENDMENT	14
II. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MINNESOTA SUPREME COURT'S HOLDING CONFLICTS WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS	19
III. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MINNESOTA SUPREME COURT'S ERRONEOUS HOLDING AND FAULTY REASONING WILL LEAD TO THE WRONGFUL ENFORCEMENT OF OTHER UNCONSTITUTIONAL TAX LAWS	26
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES:

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 17

BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002) 17

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 17

Council of Independent Tobacco Manufacturers of America v. State, 685 N.W.2d 467 (Minn. Ct. App. 2004) 1, 12

Council of Independent Tobacco Manufacturers of America v. State, 713 N.W.2d 300 (Minn. 2006) ... 1, 13, 23

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 17

FCC v. League of Women Voters, 468 U.S. 364 (1988) 15

Follett v. Town of McCormick, 321 U.S. 573 (1944) 22

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 17

McCulloch v. Maryland, 17 U.S. (Wheat.) 316 (1819) 16

Minneapolis Star & Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) 13, 19, 21, 22

O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) 22

Perry v. Sindermann, 408 U.S. 593 (1972) 15, 18

PTI, Inc. v. Philip Morris, Inc., 100 F. Supp. 2d 1179 (C.D. Cal. 2000) 23

Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) 25

TABLE OF AUTHORITIES – Continued

Page

Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 15

S&M Brands, Inc. v. Summers, 393 F. Supp. 2d 604 (M.D. Tenn. 2005) 23

Sherbert v. Verner, 374 U.S. 398 (1963) 16

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 16

Speiser v. Randall, 357 U.S. 513 (1958) 15, 16, 18, 23

Star Scientific, Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002) 23

Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) 16

STATUTES:

Alaska Stat. § 43.50.200 (2006) 26

Minn. Stat. § 297F.24 (2006) 2, 3, 4, 10, 11

Mich. Comp. Laws § 205.426(d) (2006) 26

Utah Code Ann. § 59-14-214 (2006) 26

CONSTITUTIONAL PROVISION:

U.S. Const., Amend. I ..... *passim*

OTHER AUTHORITIES:

www.naag.org/backpages/naag/tobacco/msa 8

Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988) 14

TABLE OF AUTHORITIES – Continued

Page

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 14

Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Council of Independent Tobacco Manufacturers of America respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

OPINIONS AND ORDERS ENTERED IN THE CASE

The Minnesota Supreme Court's opinion as amended after denial of rehearing is published at 713 N.W.2d 300 (Minn. 2006), and is set forth in Petitioner's Appendix at pages App. 1-32. The Minnesota Supreme Court's order denying rehearing is set forth in Petitioner's Appendix at pages App. 72-76. The Minnesota Court of Appeals' opinion is published at 685 N.W.2d 467 (Minn. Ct. App. 2004), and is set forth in Petitioner's Appendix at pages App. 33-47. The Order, Memorandum and Judgment of the Ramsey County District Court is unpublished and is set forth in Petitioner's Appendix at pages App. 48-71.

BASIS FOR SUPREME COURT JURISDICTION

The Minnesota Supreme Court filed its order denying rehearing on May 16, 2006. (App. 72-76.) The Minnesota Supreme Court filed its judgment on June 15, 2006. (App. 77-78.) On August 7, 2006, Justice Alito extended the time to file this Petition to and including September 13, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

The Minnesota tax statute at issue, Minn. Stat. § 297F.24, provides as follows:

> Subdivision 1. Fee imposed. (a) A fee is imposed upon the sale of nonsettlement cigarettes in this state, upon having nonsettlement cigarettes in possession in this state with intent to sell, upon any person engaged in business as a distributor, and upon the use or storage by consumers of nonsettlement cigarettes. The fee equals a rate of 1.75 cents per cigarette.
>
> (b) The purpose of this fee is to:
>
> (1) ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;
>
> (2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and
>
> (3) fund such other purposes as the legislature determines appropriate.
>
> Subd. 2. Nonsettlement cigarettes. For purposes of this section, a "nonsettlement cigarette"

means a cigarette manufactured by a person other than a manufacturer that:

(1) is making annual payments to the state of Minnesota under a settlement of the lawsuit styled as State v. Philip Morris Inc., No. C1-94-8565 (Minnesota District Court, Second Judicial District), if the style of cigarettes is included in computation of the payments under the agreement; or

(2) has voluntarily entered into an agreement with the state of Minnesota, approved by the attorney general, agreeing to terms similar to those contained in the settlement agreement, identified in clause (1) including making annual payments to the state, with respect to its national sales of the style of cigarettes, equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the settlement agreement required to make annual payments to the state.

Subd. 3. Collection and administration. The commissioner shall administer the fee under this section in the same manner as the excise tax imposed under section 297F.05 and all of the provisions of this chapter apply as if the fee were a tax imposed under section 297F.05. The commissioner shall deposit the proceeds of the fee in the general fund.

Minn. Stat. § 297F.24 (2006).

STATEMENT OF THE CASE

Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") brought this action challenging

the constitutionality of Minnesota Statutes Section 297F.24 (the "Act"). The Act imposes a 35 cent per pack tax (the "Tax") on all "nonsettlement cigarettes" sold in Minnesota. Minn. Stat. § 297F.24 (2006). "Nonsettlement cigarettes" are defined as those cigarettes made by a manufacturer who is: (1) not a party to the settlement agreement between the major tobacco manufacturers and the State which settled the State tobacco lawsuit; and (2) who has not entered into a "voluntary" agreement with the State with terms "similar to" the settlement agreement between the major tobacco manufacturers and the State which has been approved by the Attorney General of the State of Minnesota. Minn. Stat. § 297F.24, subd. 2. As detailed below, the major tobacco companies surrendered certain of their fundamental First Amendment rights to free speech, petition the government for a redress of grievances, and access the courts in their settlement agreement with the State. Respondents the State of Minnesota and Dan Salomone, the Minnesota Commissioner of Revenue, (collectively, the "State") stipulated to the fact that any manufacturer who seeks to enter into an agreement with the State as authorized by the Act must surrender certain First Amendment rights. (App. 3-4, 37.)

Thus, the Act imposes the Tax on only those cigarettes manufactured by parties who have refused to surrender certain of their fundamental First Amendment rights to free speech, petition the government for a redress of grievances and access the courts. (App. 3-4, 37.) The Act expressly exempts from the Tax all cigarettes manufactured by parties who have surrendered certain of their fundamental First Amendment rights to free speech,

petition the government for a redress of grievances and access the courts. (App. 3-4, 37.)

Petitioners challenged the Act as violating the First Amendment of the United States Constitution. (App. 2, 34, 71.) Although the lower courts recognized the undisputed fact that the tax was only imposed on products manufactured by parties who refuse to surrender their First Amendment rights, these courts rejected CITMA's First Amendment claims and held the Act was constitutional. (App. 1-4, 8-13, 34, 36-37, 39-41.)

CITMA is an association of small, independent tobacco manufacturers located throughout the United States. (App. 5.) Several CITMA members sell cigarettes in Minnesota and these products are considered "nonsettlement cigarettes" under the Act. As a result, the CITMA members' cigarettes are subject to the Tax. (App. 5.) The Tax effectively raises the price of CITMA members' products while having no affect on competitors' cigarettes which are exempt from the Tax. (App. 38.) This results in decreased demand and decreased sales of CITMA members' cigarettes in Minnesota. (App. 38.)

In August 1994, the State of Minnesota, along with coplaintiff Blue Cross and Blue Shield, sued the major tobacco companies to recover damages for harm caused by defendants' fraudulent and unlawful conduct in the selling of their lawful tobacco products. (App. 2-3.) Specifically, Minnesota sued Philip Morris, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Company ("R.J. Reynolds"), Brown & Williamson Tobacco Corporation ("Brown & Williamson"), B.A.T. Industries P.L.C., British-American Tobacco Company Limited, BAT (U.K. & Export) Limited, Lorillard Tobacco Company ("Lorillard"), The American Tobacco

Company, Liggett Group, Inc. ("Liggett"), The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc. (this action is referred to as the "Minnesota Tobacco Lawsuit"). (App. 2-3.) The State did not sue CITMA, nor did it sue any members of CITMA. (App. 5.)

In the Minnesota Tobacco Lawsuit, the State asserted claims for monetary, equitable and injunctive relief, and sought to place responsibility upon the defendant cigarette manufacturers for costs incurred, and to be incurred, by the State arising from the alleged illegal conduct of the defendant cigarette manufacturers in the sale of their products. (App. 2-3.) The State asserted nine causes of action against the defendants, including claims for consumer fraud, false advertising, deceptive trade practices and anti-trust violations. (App. 2-3.) The State alleged that the defendants "were responsible for health care costs incurred by the state as a result of the defendants' wrongful conduct in deceptively advertising cigarettes and misleading the public about known health risks of smoking cigarettes." (App. 2-3.) "According to the state's complaint, there was a conspiracy among [the defendants] to suppress independent research on the adverse health effects of smoking. The State also alleged that [the defendants] knowingly and actively induced children and adolescents to smoke, in order to replace the approximately 400,000 individuals who die each year from smoking-related illnesses." (App. 25.) As the State conceded, it "does not have the authority to compel tobacco manufacturers, through litigation, to make payments for health care costs. [Instead,] each count of the complaint linked the liability of the [defendants] not to health care costs incurred by the state as a result of tobacco use generally, but to increased health care costs caused by their illegal

conduct." (App. 28 n.2.) The State sought punitive damages and sought a declaration that the defendants had engaged in consumer fraud, unlawful trade practices, deceptive trade practices, false advertising, unreasonable restraints of trade, and u e of monopoly power to affect competition in violation of the laws of the State of Minnesota.

The State negotiated a settlement with the defendants in the Minnesota Tobacco Lawsuit under which the major tobacco companies agreed to make substantial payments and surrender certain of their fundamental First Amendment rights. (App. 3-4.) Initially, the State settled with Liggett in March 1997, in exchange for substantial cooperation in prosecuting the action against the remaining defendants. (App. 3, 35.) The State and Liggett executed a settlement agreement (the "Liggett Settlement Agreement"). (App. 35.) The State then settled with Philip Morris, R.J. Reynolds, Brown & Williamson and Lorillard (collectively, the "Majors") in May 1998. (App. 30, 35.) This settlement was reached only after extensive discovery, a lengthy trial and on the eve of the case going to the jury with the State seeking an award of substantial compensatory, punitive and treble damages. (App. 3, 35-36, 49-50.) The State and the Majors executed a comprehensive settlement agreement (the "Settlement Agreement"), and the trial court approved the settlement and entered a consent decree. (App. 3-4.)

Under the terms of the Settlement Agreement, the Majors agreed to make payments to the State and relinquish certain of their fundamental First Amendment rights. (App. 3-4.) The First Amendment rights surrendered by the Majors included advertising restrictions far more onerous than the State could constitutionally impose

on them, such as removing all tobacco billboards and eliminating all tobacco advertisements on buses, taxis and bus shelters, discontinuing payments to movie and television producers, and ceasing distribution of promotional items such as hats and t-shirts bearing their products' brand names. (App. 3-4.) The Majors also agreed not to oppose certain legislation impacting the tobacco industry and agreed "not to support legislation that would preempt, override or abrogate the state's rights" under the Settlement Agreement. (App. 3-4.) Further, the Majors agreed to waive their right of access to the courts, agreeing "not to facially challenge the enforceability or constitutionality of existing Minnesota laws and rules relating to tobacco control." (App. 4.)

Similarly, Liggett also agreed to surrender certain of their fundamental First Amendment rights in its settlement with Minnesota. (App. 35.) As set forth in the Liggett Settlement Agreement, Liggett agreed to substantial restrictions on its right to lawfully advertise its tobacco products, agreed to "publicly acknowledge the danger of nicotine," and agreed to refrain from challenging the validity of Food and Drug Administration regulations concerning its products. (App. 35.) Because no CITMA members were parties to the Minnesota Tobacco Lawsuit, no CITMA members entered into any settlement with the State. (App. 5.)

Other states and the Majors entered in the Master Settlement Agreement ("MSA")[1] to settle other states' and territories' tobacco lawsuits approximately six months

[1] The complete text of the MSA is available at www.naag.org/backpages/naag/tobacco/msa.

after the settlement of the Minnesota Tobacco Lawsuit. (App. 20-21, 36.) In November 1998, the Attorneys General of 46 states and six territories (collectively, the "Settling States") entered into the MSA with the Majors. (App. 20-21, 36.) The MSA settled lawsuits that had been brought against the Majors by each of the Settling States based on allegations regarding the conduct of the Majors similar to those allegations made by the State of Minnesota in the Minnesota Tobacco Lawsuit. (*Id.*) Under the MSA, the Majors agreed to make initial and annual payments totaling over $200 billion over the first 25 years. The Majors also agreed to adhere to comprehensive advertising and lobbying restrictions similar to those contained in the Minnesota Settlement Agreement. No CITMA members are a party to the MSA.

Manufacturers who were not originally named in the Settling States' lawsuits have been "encouraged" to join the MSA as "Subsequent Participating Manufacturers." To entice manufacturers to join, the MSA provides that a Subsequent Participating Manufacturer who joined the MSA within 90 days of its execution does not owe any payments on sales that do not exceed its 1998 market share or 125% of its 1997 market share. Subsequent Participating Manufacturers are required to abide by the MSA's advertising and lobbying restrictions. No CITMA members have joined the MSA as a Subsequent Participating Manufacturer.

The MSA also encourages the Settling States to enact and "diligently enforce" Qualifying Statutes which require manufacturers who do not enter into the MSA ("Non-Participating Manufacturers") to pay similar amounts that would otherwise be owed under the MSA into interest bearing escrow accounts based on their cigarette sales in

the Settling State. (App. 29, 38.) Payments under these Qualifying Statutes remain in escrow earning interest for 25 years unless used to pay the Settling State for tobacco-related claims similar to those brought against the Majors. (App. 29-31, 38.) If the Settling State does not recover such a judgment or settlement against the Non-Participating Manufacturer, the escrow payments are returned to the manufacturer, with all of the earned interest, after 25 years. (App. 29-31, 38.) The MSA provides Settling States with a model Qualifying Statute. (App. 29-31, 38.)

Rather than enacting a Qualifying Statute to create an escrow fund as 46 other states have done, Minnesota enacted the Act on May 25, 2003. (App. 5, 38) Minn. Stat. § 297F.24. The Act imposes a tax of 1.75 cents per cigarette (35 cents per pack of 20 cigarettes) upon the sale of all "nonsettlement cigarettes" in Minnesota after June 30, 2003. Minn. Stat. § 297F.24. The Act defines a "nonsettlement cigarette" as a cigarette manufactured by a person other than a manufacturer making annual payments to the State under the Settlement Agreement, thereby exempting all of the Majors' products from the Tax. *Id.* The Act also exempts manufacturers who have "voluntarily entered into an agreement" with the State with "terms similar to those contained in the Settlement Agreement," including making annual payments to the State equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the Minnesota Settlement Agreement. *Id.* The State has stipulated to the fact that only those cigarette manufacturers who have surrendered certain of their First Amendment rights are exempt from the Tax, and the Tax is imposed on nonsettling manufacturers' products unless

and until they surrender certain of their First Amendment rights. (App. 37.)

Additionally, although not expressly exempted under the terms of the statute, Liggett's cigarettes are exempted from the Act as a result of the settlement of a lawsuit Liggett filed against the State in June 2003. Liggett's lawsuit sought a declaration that its products could not be treated as "nonsettlement cigarettes" within the meaning of the Cigarette Fee Act because Liggett had entered into a separate settlement with the State, which included provisions wherein Liggett agreed to relinquish certain of its First Amendment rights. Pursuant to the July 22, 2003 settlement of that lawsuit, the State agreed to exempt Liggett from the Tax, and Liggett agreed to make annual payments of $100,000 to the State with respect to all of Liggett's brand styles. Such payments are made irrespective of how many cigarettes Liggett sells in Minnesota. Liggett's surrender of certain of its fundamental First Amendment rights under its prior settlement agreement with the State remains in full force.

Thus, the Act imposes a non-refundable tax on those cigarettes made by manufacturers that did not settle with the State of Minnesota in the Minnesota Tobacco Lawsuit and who refuse to enter into a "voluntary" settlement with the State and surrender certain of their fundamental First Amendment rights. Minn. Stat. § 297F.24. The Act is fundamentally different from the Qualifying Statutes because it imposes a non-refundable tax as opposed to requiring payments into a refundable escrow account. (App. 38.) Unlike the Qualifying Statutes, which expressly provide for the return of escrowed funds with interest if a cigarette manufacturer is not found liable for unlawful conduct similar to the Majors, the Act imposes the Tax on

all cigarettes made by nonsettling manufacturers regardless of whether the manufacturer is ever sued or found liable for any allegedly wrongful conduct. (App. 38.) As the Minnesota Supreme Court noted, the "Minnesota law, on the other hand, acts like an excise tax; the money collected through the 35¢ fee belongs to the state and can be used for general purposes." (App. 38.)

No CITMA members have been accused of the type of fraudulent and unlawful activities for which the Majors have been held culpable. (App. 20.) No CITMA members have "voluntarily" agreed to terms similar to those contained in the settlement of the Minnesota Tobacco Lawsuit. No CITMA members want to relinquish their First Amendment rights.

In June 2003, CITMA brought this action in the Ramsey County District Court in the State of Minnesota challenging the constitutionality of the Act, claiming the Act was unconstitutional under, among other provisions, the First Amendment of the United States Constitution. (App. 34-35, 71.) The parties stipulated to many of the relevant facts and filed cross-motions for summary judgment. (App. 6, 48-51.) On November 18, 2003, the District Court rejected CITMA's First Amendment claims, denied CITMA's motion for summary judgment and granted the State's motion for summary judgment. (App. 48-71.)

CITMA timely appealed. The Minnesota Court of Appeals affirmed the District Court in a published opinion. 685 N.W.2d 467 (Minn. Ct. App. 2004); App. 33-47. The Court of Appeals held that the Act did not violate the First Amendment because the Act has a "legitimate purpose" and "is not a direct attempt to regulate speech." 685 N.W.2d at 473; App. 41.

After granting discretionary review in November 2004, the Minnesota Supreme Court affirmed the District Court's Order and Judgment in a published opinion. 713 N.W.2d 300 (Minn. 2006); App. 1-32. The Minnesota Supreme Court reasoned that, because the Tax imposed on nonsettlement cigarettes is less than the payments made by manufacturers who have surrendered their First Amendment rights under the Minnesota Settlement Agreement and less than the payment which would be required by a "voluntary" agreement surrendering First Amendment rights authorized by the Act, CITMA's First Amendment claims failed. 713 N.W.2d at 306-308; App. 8-13. In doing so, the Minnesota Supreme Court ignored and misconstrued this Court's binding precedent.

REASONS FOR GRANTING THE WRIT

This Court should grant CITMA's petition for a writ of certiorari for at least three reasons. First, the Act violates the First Amendment because it punishes CITMA members by imposing the Tax on their products based on their refusal to surrender their First Amendment rights while exempting the identical products of all manufacturers who have surrendered their First Amendment rights. Second, the Minnesota Supreme Court's holding and reasoning conflict with this Court's First Amendment precedents. Indeed, the Minnesota Supreme Court's holding rejecting CITMA's First Amendment arguments is based entirely on an analysis that is in direct conflict with this Court's opinion in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Finally, the Minnesota Supreme Court's erroneous holding and faulty

reasoning will lead to the wrongful enforcement of other unconstitutional tax laws.

I. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE ACT VIOLATES THE FIRST AMENDMENT.

The Act violates the First Amendment because it taxes products based on whether the manufacturer has surrendered its First Amendment rights. The Act imposes the Tax on only those products manufactured by parties who have refused to surrender their First Amendment rights, while exempting products made by parties who have surrendered their rights. Just as it would be unconstitutional for the State to directly impose the Settlement Agreement's restrictions on a manufacturer's First Amendment rights, it is also unconstitutional to impose the Tax on CITMA members' products because they have refused to surrender their First Amendment rights. Similarly, the Act's attempt to impose the Settlement Agreement's restrictions on First Amendment rights indirectly by offering them as the only "alternative" to the Tax is unconstitutional.

This Court has held, as part of the unconstitutional conditions doctrine,[2] that a state taxing scheme that seeks to punish a taxpayer for engaging in speech protected by

[2] There is a wealth of academic writings concerning this Court's unconstitutional conditions doctrine. *See, e.g.*, Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006).

the First Amendment is unconstitutional. In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court struck down a California tax law which exempted only those veterans who swore a loyalty oath. *Id.* at 518-19. Just as the state could not constitutionally require veterans to take the loyalty oath, the state likewise could not tax only those veterans who refused to take the loyalty oath. *Id.* Allowing the State to do so would allow it to unconstitutionally punish veterans who retained their First Amendment rights and to seek to coerce those veterans into surrendering their First Amendment rights. *Id.* In other words, "To deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech," and it is therefore unconstitutional. *Id.* at 518.

This Court has explained that *Speiser* stands for the proposition that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This is because if the government "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* In other words, the government may not impose a penalty, such as a tax, to "'produce a result which it could not command directly.'" *Id.* (quoting *Speiser*, 357 U.S. at 526).

In *FCC v. League of Women Voters*, 468 U.S. 364 (1988), this Court applied these principles and struck down a federal law that conditioned the grant of federal funds on whether a television station agreed to refrain from editorializing. This Court reasoned that, because

editorializing is a right protected by the First Amendment, the government could not condition funding on a station's decision to surrender that right. *Id.* at 400-02. To allow the government to condition the receipt of funds on a waiver of First Amendment rights would unconstitutionally allow the government to punish those broadcasters who retained their First Amendment rights and coerce them into waiving their First Amendment rights. *Id.*; *see also Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (public university could not condition grant of funds on student group's waiver of its First Amendment right to publish religious periodical); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (statute that exempted certain drugs from FDA approval process, so long as drug providers agreed to surrender their right to advertise the drugs, violated First Amendment). In other words, because a state's "power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 431 (1819), the government cannot use such power to punish taxpayers for refusing to surrender their First Amendment rights.

These principles apply no matter what the purpose or intent of the government is in enacting a tax law or providing a subsidy. As this Court explained decades ago, in "*Speiser v. Randall*, 357 U.S. 513 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (emphasis added). Indeed, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court expressly *rejected* the government's argument that "discriminatory financial treatment is suspect under the

First Amendment only when the legislature intends to suppress certain ideas." 502 U.S. at 117. This Court explained that the government's assertion was "incorrect," and that a party challenging a statute under the First Amendment "need adduce 'no evidence of improper censorial motive'" to succeed. *Id.* (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

The lobbying, commercial speech and access to the Court restrictions contained in the Settlement Agreement resolving the Minnesota Tobacco Lawsuit would be unconstitutional if imposed directly by the government.[3] The State does not dispute this. The State expressly conceded in the District Court that the Act exempts from the Tax only those cigarettes made by manufacturers that have agreed to curtail specified First Amendment activities.

---

[3] First, if imposed directly, the lobbying restrictions in the Settlement Agreement would be unconstitutional. The right to lobby is part of the overall right to petition the government for a redress of grievances, which "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and is considered "core" political speech protected by the First Amendment. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Indeed, this Court has long "recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation omitted). Second, if imposed directly by the State, the commercial speech restrictions contained in the Settlement Agreement would be unconstitutional. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (holding advertising restrictions nearly identical to those contained in the Settlement Agreement violated the First Amendment). Finally, the restrictions on access to the courts to "challenge the enforceability or constitutionality of" certain laws regulating tobacco contained in the Settlement Agreement would be unconstitutional if imposed directly by the State. *California Motor*, 404 U.S. at 510, 513.

The Act is the same in all material respects as the statute held unconstitutional in *Speiser*. Indeed, the principle of *Speiser*, that the government may not condition a tax exemption on the surrender of First Amendment rights, compels a ruling that the Act is unconstitutional. The Act violates the First Amendment because it exempts from taxation only those products made by manufacturers that have surrendered their First Amendment rights to advertise, petition the government, and access the courts. *See Speiser*, 357 U.S. at 518. As this Court explained in *Speiser*, "[t]o deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech," and it is therefore unconstitutional. *Id.*; *see also Perry*, 408 U.S. at 597. Indeed, the only way that nonsettling tobacco manufacturers such as CITMA members can avoid the Tax on their products is to enter into an agreement with the State surrendering certain of their fundamental First Amendment rights. "Such interference with constitutional rights is impermissible." *Perry*, 408 U.S. at 597.

In sum, the Act violates the First Amendment by taxing only those products made by manufacturers who have refused to surrender their First Amendment rights and exempting products made by those manufacturers who have surrendered their First Amendment rights. The Act unconstitutionally singles out and taxes CITMA members' products based on their refusal to surrender their First Amendment rights.

II. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MINNESOTA SUPREME COURT'S HOLDING CONFLICTS WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS.

The Minnesota Supreme Court's holding and reasoning conflict with this Court's First Amendment precedents, including this Court's decisions under the unconstitutional conditions doctrine. The Minnesota Supreme Court wrongly ruled that the Act did not violate the First Amendment because the Tax, 35 cents per pack, is less than the amount paid by the Majors under the Minnesota Settlement Agreement, 64 cents per pack, and is less than the amount a nonsettlement cigarette manufacturer would have to pay under an agreement authorized by the Act, 48 cents per pack. (App. 9-11.) In other words, the Minnesota Supreme Court reasoned the Act was constitutional because nonsettlement manufacturers' products are taxed at a lower rate than if they entered into an agreement with the State surrendering their First Amendment rights. (App. 9-11.)

This analysis by the Minnesota Supreme Court is in direct conflict with this Court's holding in *Minneapolis Star & Tribune v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), a case the Minnesota Supreme Court failed to even cite, let alone address, in its opinion. In *Minneapolis Star & Tribune*, Minnesota made essentially same argument and this Court rejected it. Specifically, Minnesota argued that a tax which singled out newspapers for different treatment than other businesses actually favored the press over other businesses and, therefore, it did not violate the First Amendment. 460 U.S. at 588. This Court rejected that argument, refusing to "fashion a rule that

automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses." *Id.* This Court explained that singling out entities based on their exercise of First Amendment rights threatens such entities "not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment." *Id.* (emphasis in original). In other words, although a party may be treated favorably under the tax statute today, it may easily be treated unfavorably under the same law in the future. *Id.* "Thus, even without actually imposing an extra burden on the [taxpayer], the government might be able to achieve censorial effects, for the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions." *Id.* (internal quotations and alterations omitted). This Court buttressed this conclusion by explaining that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation" and, given the threat to fundamental First Amendment rights, the Court could not "tolerate the possibility" of miscalculating the relative burdens. *Id.* at 589.

Accordingly, the Act, which distinguishes among otherwise identical parties based on First Amendment rights, is not constitutional simply because it appears to treat a party retaining its rights favorably. *Id.* at 588-89. But this is exactly what the Minnesota Supreme Court erroneously held. Of course, the proper result under this Court's precedents is that the Act is unconstitutional because it distinguishes among parties based on their retention of First Amendment rights. *Id.*

Second, even if it was proper for the Minnesota Supreme Court to compare the relative burdens under the Tax and the "voluntary" settlement alternative provided by the Act, which it was not, there are serious flaws in the Minnesota Supreme Court's conclusion that CITMA members are better off paying the Tax and not surrendering their First Amendment rights under a "voluntary" agreement authorized by the Act. The Minnesota Supreme Court's comparison of the payment under an agreement authorized by the Act to the Tax mandated by the Act ignores the "value" of First Amendment rights and the "cost" of waiving those rights. By entering into an agreement authorized by the Act, the manufacturer makes the formulated payments to the State on each pack sold and incurs the "cost" of waiving its First Amendment rights in exchange for a release from civil liability for certain claims relating to its sale of cigarettes. Nonsettling manufacturers such as CITMA's members incur the burden of the Tax imposed under the Act and retain the "value" of their First Amendment rights, while receiving none of the civil liability protections granted under the release in an agreement authorized by the Act. Thus, it is impossible to determine which of these "choices" has the greater inherent value or economic benefit for cigarette manufacturers, let alone to evaluate the level of coercion imposed on such manufacturers. The only thing that is clear is that the Act, just as the Minnesota tax law struck down in *Minneapolis Star & Tribune*, unconstitutionally singles out and taxes certain parties based on their First Amendment rights.

Third, the Minnesota Supreme Court's decision ignores this Court's repeated teaching that a government cannot impose a tax "as a condition of engaging in protected" First Amendment activities. *See, e.g., Minneapolis*

Star & Tribune, 460 U.S. at 586 n.9; *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944) ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of the censorship or a previous restraint."). The Act imposes the Tax based upon whether a manufacturer has surrendered its First Amendment rights: cigarettes made by manufacturers that refuse to surrender their First Amendment rights are taxed and those that are made by manufacturers that have surrendered their First Amendment rights are exempt. The Act draws an explicit distinction and imposes the Tax based on whether the manufacturer has relinquished its First Amendment rights. Thus, the Act violates the First Amendment by effectively conditioning the right of Appellants to retain their First Amendment rights upon the payment of the Tax on their products. *Minneapolis Star & Tribune*, 460 U.S. at 586 n.9 ("By imposing the taxes as a condition of engaging in protected activity, [the government] imposed a form of prior [unconstitutional] restraint on speech.") Accordingly, the Act violates the First Amendment.

Fourth, contrary to the Minnesota Supreme Court's opinion, the Act does not merely offer a "voluntary" waiver of First Amendment rights. Rather, the Act attempts to force nonsettlement manufacturers such as CITMA members to waive their First Amendment rights by offering such a waiver as the *only* alternative to the Tax. Under such circumstances, First Amendment rights cannot constitutionally be waived, irrespective of whether the State chooses to characterize the waiver as "voluntary." *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996) ("A State may not condition public

employment on an employee's exercise of his or her First Amendment rights.").

Indeed, before one ever reaches the issue of whether a nonsettling manufacturer would wish to enter into a "voluntary" agreement authorized by the Act, the nonsettling manufacturer is being punished for its retention of its First Amendment Rights. The nonsettling manufacturers' products are subject to the Tax *because* the manufacturer has refused to surrender its First Amendment rights. Thus, prior to ever facing the "choice" of whether to enter into a "voluntary" settlement with the State to avoid the Tax, the nonsettling manufacturers' products are already subject to the unconstitutional Tax based on the nonsettling manufacturers' refusal to surrender their First Amendment rights. And the products of the Majors are already exempt from the Tax because the Majors have surrendered their First Amendment rights. Accordingly, the Act violates the First Amendment. "To deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech," and it is therefore unconstitutional. *Speiser*, 357 U.S. at 518.

The Minnesota Supreme Court's reliance on case law addressing challenges to the Qualifying Statutes enacted in other states pursuant to the Master Settlement Agreement is wholly misplaced because of the fundamental differences between the Qualifying Statutes and the Act. *See* 713 N.W.2d 307-308, App. 11-13, citing and quoting *S&M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604 (M.D. Tenn. 2005); *see also Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000). The Qualifying

Statutes require non-participating cigarette manufacturers to make payments into an interest bearing escrow account, roughly equivalent to payments that would be required if these manufacturers had joined the Master Settlement Agreement. These escrow payments remain the property of the non-participating manufacturers and the manufacturers are entitled to the return of all such escrow payments with interest unless and until they are held liable for damages caused by their conduct. Thus, these manufacturers do not and will not lose ownership of these escrowed funds unless and until the particular state establishes that the manufacturer is liable for damages caused by its conduct.

In contrast, the Act imposes a direct Tax on only those cigarettes made by nonsettling manufacturers who have refused to surrender their First Amendment rights, and exempts all cigarettes made by manufacturers who have waived their First Amendment rights. The Tax is not refundable; the manufacturers will not receive the return of these funds under any circumstances; the State never has to establish that the manufacturer is liable; and the Tax payments go directly into the State's General Fund without any requirement that the State establish the nonsettling manufacturer's liability.

Finally, the apparent reliance by the Minnesota Supreme Court on the idea that the Act is meant to remedy nonsettlement manufacturers' alleged "unfair competitive advantage over" the Majors and Liggett is irrelevant to a proper First Amendment analysis. (App. 4-5) (noting "problems" caused by the Majors' and Liggett's "lost market share to other manufacturers who were not subject to the [Minnesota Tobacco Lawsuit] settlement."). Initially, any "competitive advantage" nonsettlement manufacturers

have over the Majors as a result of not having to make payments to settle claims of wrongdoing is not "unfair." The Majors and Liggett are making settlement payments to the State as part of the resolution of the State's claims against them for fraud, false advertising, and conspiracy based on their decades long deceit of the American people. Nonsettlement manufacturers, including CITMA members, are not making any such settlement payments because no one has ever accused them of such conduct, let alone proven it in court. Thus, any "advantage" held by CITMA members and other nonsettlement manufacturers is not "unfair." More importantly, even if nonsettlement manufacturers' alleged "advantage" was "unfair" – which it is not – the State cannot remedy such "unfairness" by violating the First Amendment.[4]

---

[4] The Minnesota Court of Appeals' reliance on *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), was also misguided. 685 N.W.2d at 473; App. 40-41. This Court's decision in *Regan* supports, not undermines, CITMA's argument that the Act violates the First Amendment. In *Regan*, this Court explained "although government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove those not of its own creation." 461 U.S. at 549-550 (internal quotation and alterations omitted). This Court upheld the statute in *Regan* because, while the government had chosen not to subsidize lobbying, it had placed no impediments to the plaintiff's First Amendment right to lobby. Here, in contrast, the government *has* placed obstacles and impediments directly in the path of CITMA's members' exercise of their First Amendment rights. The Tax on CITMA's members' products effectively conditions their retention of their First Amendment rights on their products being taxed. Thus, this case does not concern a failure by the State to remove obstacles not of its own creation – it involves the State creating and placing obstacles squarely in the path of nonsettlement manufacturers' retention of First Amendment rights.

III. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE MINNESOTA SUPREME COURT'S ERRONEOUS HOLDING AND FAULTY REASONING WILL LEAD TO THE WRONGFUL ENFORCEMENT OF OTHER UNCONSTITUTIONAL TAX LAWS.

This Court should grant a Writ of Certiorari in this case because the Minnesota Supreme Court's erroneous holding and faulty reasoning will be applied in other circumstances, leading to the wrongful enforcement of other unconstitutional tax laws.

Initially, there are at least three other state statutes which impose taxes on only those cigarettes made by parties who have refused to surrender their First Amendment rights while expressly exempting identical cigarettes made by parties who have surrendered their First Amendment rights. *See* Alaska Stat. § 43.50.200 (2006) (imposing an "excise tax" of 25 cents per pack on all cigarettes sold by manufacturers who have not surrendered their First Amendment rights by participating in the Master Settlement Agreement); Mich. Comp. Laws § 205.426(d) (2006) (imposing an "equity assessment" of 35 cents per pack on all cigarettes sold by manufacturers who have not surrendered their First Amendment rights by participating in the Master Settlement Agreement); Utah Code Ann. § 59-14-214 (2006) (imposing an "equity assessment" of 35 cents per pack on all cigarettes sold by manufacturers who have not surrendered their First Amendment rights by participating in the Master Settlement Agreement). These laws are identical in all material respects to the Act and, therefore, they violate the First Amendment for the reasons set forth above. However, a First Amendment challenge to these laws is likely to be

wrongly denied using the Minnesota Supreme Court's opinion in this case as precedent.

Further, the Minnesota Supreme Court's erroneous holding and faulty reasoning could be used in other circumstances to wrongly uphold and enforce other unconstitutional tax laws which discriminate against parties based on whether they have retained their First Amendment rights. The Minnesota Supreme Court's holding and reasoning could readily be applied to tax laws applicable to industries other than tobacco. For example, it is easy to envision a state government suing alcohol manufacturers for false advertising and fraud arising out of alleged unlawful conduct in advertising and selling their beer, wine or spirits. If the case is settled, the settlement agreement would likely be structured in a manner similar to the settlement of the Minnesota Tobacco Lawsuit, with the alcohol makers surrendering certain of their fundamental First Amendment rights. Of course, once such manufacturers raised their prices to pay for the settlement and began to lose market share to alcohol makers who had never been accused of such unlawful conduct, a state could, using the Act and the Minnesota Supreme Court's opinion in this case as templates, impose a tax on only those alcohol makers who refuse to surrender their First Amendment rights in a settlement with the state. Similarly, this same scenario could easily play out in the fast food industry, gun industry, or any other industry selling products which can harm consumers and which are alleged to have been unlawfully marketed to the public.

The above is not simply a rhetorical parade of horribles. It is supported by the Minnesota Supreme Court's own carefully chosen, but ill-advised, language set forth in

the opinion in this case. The Minnesota Supreme Court specifically held:

> Whether [nonsettlement manufacturers] have engaged in any wrongdoing is irrelevant to the inquiry: it is the harmful nature of their products that triggers the payment [of the Tax], and that their products are harmful is not disputed. The state need not, and should not be required to, allege wrongdoing against nonsettling manufacturers who admit the health effects of their products are no different from manufacturers who are already making payments to the state to cover those health costs. Nor should the state have to allege wrongdoing in the marketing or sale of a product that is acknowledged to be harmful in order to require the consumers of that product to bear at least some of the cost of rectifying that harm.

713 N.W.2d at 311; App. 20. With this type of sweeping, but fundamentally misguided language, the Minnesota Supreme Court's opinion will easily become a blunt tool allowing other courts to wrongly uphold and enforce discriminatory taxes in violation of the First Amendment whenever a product is deemed "harmful" to someone or something. This Court should grant CITMA's petition for a writ of certiorari to avoid such disastrous results.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KARL E. ROBINSON
(*Counsel of Record*)

WINTHROP & WEINSTINE, P.A.
225 South Sixth Street,
Suite 3500
Minneapolis, MN 55402-4629
Telephone: (612) 604-6400

September 13, 2006

713 N.W.2d 300

STATE OF MINNESOTA

IN SUPREME COURT

A03-2020

Court of Appeals

Council Of Independent Tobacco Manufacturers Of America, et al.,

Appellants,

vs.

The State of Minnesota, et al.,

Respondents.

Page, J.
Dissenting, Meyer, J.
Took no part, Anderson, Russell A., C.J., and Gildea, J.

Filed: March 16, 2006
Office of Appellate Courts

SYLLABUS

1. Minnesota Statutes § 297F.24 (2004) does not unconstitutionally restrict the First Amendment rights of tobacco distributors and manufacturers who are not parties to the settlement of the state's tobacco suit, *State by Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Ramsey Cty. Dist. Ct.).

2. Minnesota Statutes § 297F.24 does not violate the Uniformity Clause of the Minnesota Constitution or the equal protection rights of tobacco distributors and manufacturers who are not parties to the settlement of the state's tobacco suit, *State by Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Ramsey Cty. Dist. Ct.).

3. Minnesota Statutes § 297F.24 does not constitute a bill of attainder.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

PAGE, Justice.

We are asked to determine the constitutionality of Minn. Stat. § 297F.24 (2004), Minnesota's Cigarette Fee Act (the Act). Appellants, Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Co., and Winner Tobacco Wholesale, Inc. (collectively, appellants), challenge the constitutionality of the Act on three grounds: (1) violation of the First Amendment to the United States Constitution and Article I, Sections 3 and 8, of the Minnesota Constitution; (2) violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Uniformity Clause of the Minnesota Constitution; and (3) violation of the prohibitions against bills of attainder in the United States and Minnesota Constitutions. The district court and court of appeals upheld the Act against these challenges. We affirm.

I.

In 1994, in *State by Humphrey v. Philip Morris Inc.*, the state and co-plaintiff Blue Cross and Blue Shield sued certain major cigarette manufacturers and trade organizations, asserting claims for monetary, equitable, and injunctive relief.[1] *Id.*, No. C1-94-8565 (Ramsey Cty. Dist. Ct.).

[1] The named defendants in the tobacco lawsuit were: Philip Morris Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co.; B.A.T. Industries PLC, British-American Tobacco Co. Ltd.; BAT (U.K.

(Continued on following page)

The state alleged that the defendants were responsible for health care costs incurred by the state as a result of the defendants' wrongful conduct in deceptively advertising cigarettes and misleading the public about known health risks of smoking cigarettes.

The state settled with one of the defendant manufacturers, Liggett, in 1997 in exchange for its cooperation. In May 1998, the state settled with the remaining defendants (collectively, the Majors). *State by Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Ramsey Cty. Dist. Ct., *consent judgment entered*, May 19, 1998). The terms of the settlement require the Majors to make six one-time settlement payments to the state and to make additional "annual payments" to the state in perpetuity based, in part, on their annual tobacco sales.[2]

The terms of the settlement also require the Majors to restrict their advertising, lobbying, and litigation activities. With respect to advertising, the Majors agreed to stop transit and billboard advertising of tobacco products in Minnesota, agreed to stop paying for product placement of their cigarettes and for cigarette advertisements

---

& Export) Ltd.; Lorillard Tobacco Co.; The American Tobacco Co.; Liggett Group, Inc.; The Council for Tobacco Research-U.S.A., Inc.; and The Tobacco Institute, Inc.

[2] Over the course of a six-year period (1998-2003), the Majors agreed to make payments to the state pro rata to their market share in the following amounts: $240 million – 1998; $220.8 million – 1999; $242.55 million per year in 2000, 2001, 2002; and $121.55 million in 2003. The Majors also agreed to make annual payments to the state pro rata to their market share on December 31, 1998, and each year thereafter totaling 2.55 percent of $4 billion in 1998; 2.55 percent of $4.5 billion in 1999; 2.55 percent of $5 billion in 2000; 2.55 percent of $6.5 billion in 2001 and 2002; and 2.55 percent of $8 billion in 2003 and thereafter in perpetuity.

in movies, and agreed to stop selling branded and logoed merchandise in Minnesota. With respect to lobbying, the Majors agreed to report to the state any payments made to lobbyists in connection with tobacco products or their use. Finally, the Majors agreed to not oppose the passage of certain legislation intended to reduce tobacco use by children, agreed not to facially challenge the enforceability or constitutionality of existing Minnesota laws and rules relating to tobacco control, and agreed not to support legislation that would preempt, override, or abrogate the state's rights under the tobacco settlement.

Under the settlement, the annual payments to be made by the Majors to the state are to be based, in part, on their annual tobacco sales. But as the Majors raised their prices, presumably to cover the cost of the settlement, predictably they lost market share to other manufacturers who were not subject to the settlement. Although the Majors and Liggett accounted for 98 percent of cigarette sales in 1997, by 2002 their national market share had fallen to about 88 percent. It is presumed that smaller manufacturers who were not parties to the settlement have been able to capture a larger share of the market because of their lower prices.

Thus, the state faced a series of problems. The state claims that health care costs associated with the use of cigarettes not subject to the 1997 tobacco settlement were likely to increase because sales of those cigarettes were increasing, and the state was receiving less from the Majors with which to pay those costs. At the same time, because cigarette consumption by underage smokers is acknowledged to be price-sensitive, the increasing availability of cheaper cigarettes was doing little to discourage underage smoking.

To address these problems, in 2003 the Minnesota legislature enacted Minn. Stat. § 297F.24 (2004), Minnesota's Cigarette Fee Act (the Act). The Act imposes a 35¢ per pack fee on cigarettes distributed in Minnesota after June 30, 2003. But some cigarettes are exempt from the 35¢ payment: cigarettes covered by the settlement between the Majors and the state, and cigarettes produced by other manufacturers that since 1997 have voluntarily entered into agreements with the state. The statute refers to those cigarettes on which the fee is imposed as "nonsettlement" cigarettes. *Id.*, subd. 2. The statute expressly states that the purposes of the fee are to:

> (1) ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;
>
> (2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and
>
> (3) fund such other purposes as the legislature determines appropriate.

Id., subd. 1(b).

Appellants are an organization of cigarette manufacturers, an individual cigarette manufacturer, and a cigarette distributor, none of which were defendants in the initial state tobacco litigation and therefore are not parties to the Minnesota tobacco settlement. To prevent enforcement of the Act, on June 26, 2003, appellants filed a summons and complaint against the state, alleging the Act is unconstitutional. Appellants moved for a temporary

restraining order and injunction. The district court denied appellants' motion because it concluded that appellants had not satisfied the *Dahlberg* factors for issuance of a temporary restraining order or temporary injunction. *See Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

After the parties stipulated to certain facts, appellants moved for summary judgment. The state also sought dismissal of the case, asserting that the Act does not violate any provisions of the United States or Minnesota Constitutions. The district court granted the state's motion and denied appellants' motion. The district court concluded that appellants had not overcome the presumption of constitutionality that generally accompanies legislative enactments because the Act was "certainly within the purview of the legislature." The court found that, while appellants may not have been accused of wrongdoing, the legislature could impose the fee in the Act because the sale of low-cost cigarettes contributed to underage smoking. The court went on to say that the legislature "has an absolute right and duty to do everything with [sic] the Constitution to discourage illegal smoking and to discourage people from voluntarily increasing the cost of healthcare for the population in general." According to the court, the Act does not violate either the Equal Protection Clause or the Uniformity Clause because the statute does not create a selective classification; it simply gives tobacco companies the choice to enter into payment agreements with the state to avoid subjecting their products to the fee. The court also rejected the due process, bill of attainder, and First Amendment claims.

The court of appeals affirmed, addressing each of appellants' claims regarding the unconstitutionality of the

Act. *Council of Indep. Tobacco Mfrs. of Am. v. State*, 685 N.W.2d 467 (Minn. App. 2004). Applying the rational basis standard, the court of appeals concluded that the Act serves a legitimate purpose within the state's power to achieve and that the fee is not a direct attempt to regulate speech; therefore, there was no First Amendment violation. *Council*, 685 N.W.2d at 473.

Second, the court of appeals applied the Minnesota rational basis test and concluded that the Act does not violate the Equal Protection Clause or the Uniformity Clause. *Council*, 685 N.W.2d at 473-74. The court concluded that a reasonable basis exists for distinguishing between settling and nonsettling manufacturers because settling manufacturers make annual payments to the state in perpetuity and nonsettling manufacturers do not. *Id.* at 474. The court also reasoned that the classification in the Act is relevant to the purpose of the law because "[w]ithout the cigarette fee, the non-settling manufacturers avoid assuming responsibility for the hidden costs of smoking and can maintain their prices at a lower level," making smoking more attractive to underage smokers. *Id.* Additionally, the court concluded that the purposes of the Act are neither invidious nor arbitrary. *Id.*

The court of appeals rejected appellants' bill of attainder claim because the court concluded that the Act regulates prospective conduct, rather than punishing past conduct, and is not punitive in nature. *Council*, 685 N.W.2d at 474-75. Finally, the court held that the Act does not constitute special legislation in violation of art. XII, § 1, of the Minnesota Constitution. *Council*, 685 N.W.2d at 475-76. The court reasoned that the legislature may lawfully "create different classes and apply different rules to them so long as the classification is based on

substantial distinctions." *Id.* at 475. The court applied our three-part rational basis test and concluded that "the classifications in the statute between settling manufacturers, who pay annual fees that subsidize the costs to the state of smoking and act to raise cigarette prices to discourage youthful smokers, and non-settling manufacturers, who do not, create a genuine and substantial distinction tied to a legitimate state interest." *Id.* at 475-76.

We address all three of appellants' arguments, beginning with appellants' challenge under the First Amendment, then turning to appellants' challenge under the Uniformity Clause and on equal protection grounds, and finally appellants' challenge to the statute as a bill of attainder. In our analysis, we are reminded of the heavy burden appellants face in seeking to invalidate a statute. We are to invoke every presumption in favor of the constitutionality of the statute, *Reed v. Bjornson*, 191 Minn. 254, 257, 253 N.W. 102, 104 (1934), and are to declare statutes unconstitutional only when absolutely necessary and with extreme caution. *Walker v. Zuehlke*, 642 N.W.2d 745, 750 (Minn. 2002), quoting *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999).

Because appellants have failed to meet this heavy burden with respect to any of the grounds they assert, we conclude that the statute is constitutional.

II.

Appellants first challenge the Act on grounds that it unconstitutionally restricts their First Amendment rights. Appellants assert that the Act unconstitutionally burdens their right to both petition the government for redress of

grievances and to advertise, because the Act effectively conditions their right to advertise and to lobby the government on the payments required by the Act.

The restrictions on advertising and lobbying to which appellants object do not appear in the Act itself. Rather, they are part of the Majors' 1998 settlement agreement with the state and the Commissioner of Revenue has stated that, as a matter of policy, they will be incorporated in any later settlements with other tobacco manufacturers.

The parties have stipulated that, under the 1998 settlement agreement, the Majors pay the equivalent of 64¢ per pack. The Act specifies that, if other manufacturers settle with the state, their cigarettes will be subject to a fee of at least 48¢ per pack (75 percent of what the Majors pay) and the settling manufacturers must submit to restrictions on advertising, lobbying, and access the courts as part of the settlements. Further, under the language of the Act, nonsettlement cigarettes are subject to a fee of only 35¢ per pack and nonsettling manufacturers and distributors are not subject to any restrictions on their advertising, lobbying, or ability to litigate.

The state cannot deny a benefit on a basis that infringes appellants' constitutionally protected interests, including freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). But to invoke this "unconstitutional conditions" doctrine, appellants must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their First Amendment rights. *See Perry v. Sindermann*, 408 U.S. at 598 (requiring plaintiff to show on remand that the decision to not renew his contract was, in fact, made in retaliation for his exercise of

free speech). Appellants have failed to make this threshold showing.

Appellants argue that, in order to obtain the exemption provided in the Act, they must surrender their rights to advertise, lobby, and access the courts. But this argument ignores the fact that the impact on settlement cigarettes that are exempt under the Act is more per pack than the fee the Act imposes on cigarettes manufactured by appellants. Under the terms of the Minnesota tobacco settlement, as appellants have stipulated, the Majors pay the equivalent of 64¢ per pack. Under the terms of the Act, the cigarettes of manufacturers that voluntarily agree to terms with the state are subject to a fee of at least 48¢ per pack. The statute subjects the cigarettes of appellants to a fee of only 35¢ per pack – little more than half of what the Majors pay – with no restrictions on appellants' right to advertise, lobby, or access the courts. The Act expressly conditions exemption from the 35¢ per pack charge on these payments:

> For purposes of this section, a "nonsettlement cigarette" means a cigarette manufactured by a person other than a manufacturer that:
>
> (1) is making annual payments to the state of Minnesota under a settlement of the lawsuit styled as *State v. Philip Morris Inc.*, No. C1-94-8565 (Minnesota District Court, Second Judicial District), if the style of cigarettes is included in the computation of the payments under the agreement; or
>
> (2) has voluntarily entered into an agreement with the state of Minnesota, approved by the attorney general, agreeing to terms similar to those contained in the settlement agreement,

> identified in clause (1) including making annual payments to the state, with respect to its national sales of the style of cigarettes, equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the settlement agreement required to make annual payments to the state.

Minn. Stat. § 297F.24, subd. 2 (2004).

Appellants have not shown they are worse off under the Act if they refuse to renounce their First Amendment rights. Therefore, appellants have not shown that, as a threshold matter, the Act denies them a benefit based on their renouncement of their First Amendment rights.

Nor does the statute here fit the *Speiser/Perry* model. In *Speiser*, the United States Supreme Court addressed the effect of a California statute that required veterans to sign a loyalty oath as a condition of receiving an exemption from property taxes. *Speiser*, 357 U.S. at 516-17. In contrast to the California statute, the Act does not explicitly reference speech, nor is the stated purpose of the statute to restrict speech. *See* Minn. Stat. § 297F.24, subd. 1(b) (2004) (setting forth the purposes of the fee imposed by the Act). We conclude that, while the Act provides appellants with the opportunity to resolve any possible claims for past misconduct in the sale of their cigarettes by means of a voluntary settlement with the state, it does not coerce or penalize a manufacturer that does not avail itself of that opportunity. Simply put, paying less with no restrictions on First Amendment rights is not coercive and does not constitute a penalty.

Our conclusion comports with the result reached by a federal district court that addressed a First Amendment

challenge to the national tobacco settlement. *S & M Brands, Inc. v. Summers*, 393 F.Supp.2d 604 (M.D. Tenn. 2005). Under the national tobacco settlement, as a condition of receiving full settlement payments, participating states are required to enact "Qualifying Statutes" that obligate each tobacco product manufacturer to either become a "participating manufacturer" (as defined in the national tobacco settlement agreement) or make payments to an escrow fund. Those manufacturers that elect to become "participating manufacturers" make payments to the state and voluntarily agree to the same restrictions on advertising, lobbying, and product placement as the original signatories to the settlement. Those manufacturers that choose not to become "participating manufacturers" pay a fee that for the years 2003 through 2006 is $.0167539 per cigarette sold in the state, and for the years 2007 and thereafter is $.0188482 per cigarette sold. In *S & M Brands*, the federal district court upheld the escrow requirement on the same grounds we employ here: the escrow payments required under the national tobacco settlement are no greater than the amounts the manufacturer would be obligated to pay by participating in the settlement.

> Thus, the focus of the unconstitutional conditions doctrine is on whether a governmental entity is denying a benefit to Plaintiffs that they could obtain by giving up their freedom of speech, or is penalizing them for refusing to give up their First Amendment rights. The Court finds that no such conditions are imposed upon Plaintiffs under Tennessee's legislative scheme. The Escrow Act, as amended by the ASR Amendment, leaves Plaintiffs no worse off financially than they would be under the [Master Settlement Agreement], because it expressly

> provides that Plaintiffs are entitled to a refund on any amounts paid into escrow that they can demonstrate is in excess of the amount they would have paid under the [Master Settlement Agreement]. Further, Plaintiffs retain all of the First Amendment and other rights that the [participating manufacturers] gave up when they signed the [Master Settlement Agreement]. Because Defendant is neither denying a benefit to Plaintiffs that they could obtain by giving up their freedom of speech nor punishing Plaintiffs for refusing to give up their free speech rights, the unconstitutional conditions doctrine does not apply.

Id. at 637-38 (citations omitted).

We therefore affirm the court of appeals' holding that the Act does not unconstitutionally infringe appellants' First Amendment rights.

III.

Appellants also challenge the statute as unconstitutional under the Uniformity Clause and on equal protection grounds. The Uniformity Clause of the Minnesota Constitution, art. X, § 1, requires that taxes be "uniform upon the same class of subjects" but allows taxes to differ between subject classes. The legislature has broad discretion in granting tax exemptions. *Rio Vista Non-Profit Housing Corp. v. County of Ramsey*, 335 N.W.2d 242, 245 (Minn. 1983) (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)). We have stated we will not disturb a tax classification unless the classification is "clearly arbitrary and has no reasonable basis." *In re Cold Spring Granite Co.*, 271 Minn. 460, 466, 136 N.W.2d 782,

787 (1965). And, consistent with our deference to the legislature in this area, we have quoted with approval the United States Supreme Court's holding that those who would challenge a tax classification must show "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Hegenes v. State*, 328 N.W.2d 719, 721 (Minn. 1983) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).

Having decided the Act does not unconstitutionally restrict appellants' First Amendment rights, we review their Uniformity Clause challenge under the rational basis standard. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 421-22 (Minn. 2005), quoting *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 820 (Minn. 1998) (when the challenged statute does not involve a suspect classification or a fundamental right, the appropriate standard of review is rational basis). Our rational basis test requires us to consider three elements:

> (1) the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one the state can legitimately attempt to achieve.

Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn. 1979). We turn now to that analysis.

A.

As we did in *Erie Mining Co. v. Comm'r of Revenue*, 343 N.W.2d 261, 268 (Minn. 1984), when conducting a rational basis review we consider the purpose of the statute first. In enacting Minn. Stat. § 297F.24, the legislature gave three express purposes:[3]

> (1) ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;
>
> (2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and
>
> (3) fund such other purposes as the legislature determines appropriate.

Minn. Stat. § 297F.24, subd. 1(b).[4]

We have previously upheld taxes aimed at the state's first expressed purpose, namely, shifting or internalizing the social costs of a product. For example, in *Miller Brewing*, we analyzed an excise tax on beer, against which in-state manufacturers received a credit. *Miller Brewing*, 284 N.W.2d at 355. Although a brewer with no production

---

[3] We use the terminology given by the legislature to the payments required by the statute, and take no position on whether the payments are "fees" or "taxes."

[4] Although the statute refers to payments by manufacturers, as we indicated above, under Minnesota's Unfair Cigarette Sales Act, the fee is added to the minimum price of cigarettes and therefore is paid by smokers.

facilities in the state claimed the tax violated the Uniformity Clause, we upheld the tax, noting the credit reflected in part that in-state brewers paid substantially more of the "social costs" resulting from the sale of beer in the state, such as costs for law enforcement and welfare. *Id.* at 356-57. Similarly, in *Westling v. County of Mille Lacs*, 581 N.W.2d at 821, we upheld against a Uniformity Clause challenge a special tax on environmentally contaminated property because, in part, contaminated property imposes a "greater burden on society" than uncontaminated property. In *Hegenes*, 328 N.W.2d at 721, 723, we also upheld against a Uniformity Clause challenge a state tax statute that imposed higher taxes on residential real estate of four or more rental units, because larger multi-unit properties may differ from smaller properties in their use of governmental services such as fire and police protection.

And we have previously upheld taxes aimed at the state's second expressed purpose, namely, preserving competition. So, for example, in *Lifteau v. Metropolitan Sports Facilities Comm'n*, 270 N.W.2d 749, 755 (Minn. 1978), we upheld the exemption of three communities from the 2 percent tax imposed on retail beer and liquor sales in the metropolitan area. *Id.* at 752. Because those communities were located on the outskirts of the metropolitan area, they had licensed on-sale establishments both within and outside the area subject to tax. As we observed, if the legislature had not exempted those communities from the tax, competing on-sale establishments in the same community would have borne unequal burdens. *Id.* at 755. In *Brainerd Area Civic Ctr. v. Comm'r of Revenue*, 499 N.W.2d 468, 471-72 (Minn. 1993), we upheld a graduated tax on combined gambling receipts because it leveled the playing field between large and small gambling operators.

However, in analyzing the purpose of the classifications created by the statute, we are not restricted to those purposes expressly stated by the legislature. Rather, *any* legitimate purpose can support the classifications created by the statute. *In re McCannel*, 301 N.W.2d 910, 917 (Minn. 1980). So, for example, in *Westling* we acknowledged as legitimate a tax classification because, as we independently noted, a tax on contaminated property recaptures revenues lost when property values decline due to the contamination. 581 N.W.2d at 821. Also in *Westling*, we upheld a tax classification designed, in part, to change the behavior of those being taxed when we noted the tax on contaminated property gives owners of contaminated property an incentive to clean it up and encourages owners of uncontaminated property to act responsibly to avoid the tax. *Id.*

In accordance with these precedents, Minn. Stat. § 297F.24 has many legitimate purposes: internalizing the health care costs of cigarettes; discouraging underage smoking by limiting access to cheaper cigarettes; leveling the playing field between manufacturers already paying substantial sums to the state and newcomers who have gained market share at their expense; and recapturing revenue lost as the market shares of the settling manufacturers have declined.

B.

Having established that Minn. Stat. § 297F.24 has legitimate purposes, we continue our rational basis review by looking next to the classifications established by the statute. Under *Miller Brewing*, we ask whether the classifications established by the statute are reasonably related

to those purposes – stated and unstated – based on their "logical effect." *Miller Brewing*, 284 N.W.2d at 357. Again, the answer is yes.

The law imposes a fee of 35¢ per pack of cigarettes. Some cigarettes are exempt: those included in the computation of payments made to the state under the 1998 tobacco settlement and those as to which the manufacturer has agreed to a separate voluntary settlement with the state.

No matter which purpose we choose, the classifications (settling versus nonsettling) are relevant and logical. For example, if the purpose of the statute is to ensure that all cigarettes sold contribute toward the costs attributable to the use of those cigarettes, it is reasonable to impose an additional charge on the cigarettes of those manufacturers who are not otherwise contributing through either the tobacco settlement or individual voluntary settlements. If the purpose of the statute is to discourage underage smoking, it is reasonable, given the correlation between the cost of cigarettes and underage smoking, to impose an additional cost on low-cost cigarettes to drive up their prices. If the purpose of the statute is to level the playing field between settling and nonsettling manufacturers, it is reasonable to impose additional costs on the cigarettes of nonsettling manufacturers. If the purpose of the statute is to recapture revenue lost by the state as the major manufacturers lose market share, it is reasonable to impose additional fees on the cigarettes of those manufacturers whose market share is increasing because the logical effect will be an increase in revenues collected. Because its classification is reasonably related to its purposes, Minn. Stat. § 297F.24 satisfies the second prong of the *Miller Brewing* test.

C.

Finally, we ask whether the differences between the taxpayers distinguished by the statute provide a "natural and reasonable basis" for separate classifications. *Miller Brewing*, 234 N.W.2d at 356. As indicated by *Miller Brewing*, our inquiry is whether there are substantial differences between settling and nonsettling manufacturers and, if so, whether those differences provide a "natural and reasonable basis" for treating them differently. Again, the answer to both questions is yes. There are substantial differences between settling and nonsettling manufacturers. Settling manufacturers make payments to the state to cover the social costs of smoking; nonsettling manufacturers make no such payments. Settling manufacturers have agreed to changes in their behavior and marketing practices that are designed to reduce the health effects of their products in the future; nonsettling manufacturers have agreed to no such changes and, as a result, the state can expect to incur increasing costs in the future attributable to the use of nonsettling manufacturers' products. Settling manufacturers have agreed to discourage underage smokers from buying their cigarettes; nonsettling manufacturers have made no such agreement and, in fact, have taken advantage of the settling manufacturers' price increases to increase their own sales. Given the purposes of the statute, it is natural and reasonable to require the buyers of nonsettling manufacturers' cigarettes to pay something toward the future health care costs to which their use of those cigarettes will give rise.

As shown above, the purposes of Minn. Stat. § 297F.24 are legitimate, the classifications established by the statute are reasonably related to those purposes, and the

differences between settling and nonsettling manufacturers provide a natural and reasonable basis for treating them differently under the statute. Thus, under our analysis in *Miller Brewing*, Minn. Stat. § 297F.24 is constitutional.

D.

While appellants agree the state has a legitimate interest in curbing the health care costs associated with cigarette smoking, they deny the state can require them to make payments comparable to the payments made by the Majors because, according to appellants, there is no proof they have done anything wrong.

Whether appellants have engaged in any wrongdoing is irrelevant to the inquiry: it is the harmful nature of their products that triggers the payment, and that their products are harmful is not disputed. The state need not, and should not be required to, allege wrongdoing against nonsettling manufacturers who admit the health effects of their products are no different from manufacturers who are already making payments to the state to cover those health costs. Nor should the state have to allege wrongdoing in the marketing or sale of a product that is acknowledged to be harmful in order to require the consumers of that product to bear at least some of the cost of rectifying that harm.

Appellants' focus on the differences between Minn. Stat. § 297F.24 and the "qualifying statutes" required under the national tobacco settlement as proof of the Minnesota statute's unconstitutionality is also misplaced. Approximately six months after execution of the Minnesota settlement agreement, 46 states and 6 other United

States jurisdictions also settled their lawsuits against the major tobacco manufacturers by entering into a "Master Settlement Agreement." Like Minnesota's settlement, the Master Settlement Agreement (to which Minnesota is not a party) requires the participating tobacco manufacturers to make large settlement payments over time, to make additional annual payments in perpetuity, and to agree to certain restrictions on lobbying and advertising.

The Master Settlement Agreement anticipates that, as the participating manufacturers raise their prices to cover the costs of the master settlement, they will lose market share to nonparticipating manufacturers. Thus, as noted above, the Master Settlement Agreement requires participating states to enact "Qualifying Statutes" to neutralize the competitive advantage of nonparticipating manufacturers. Under the model "Qualifying Statute," manufacturers of tobacco products must either join the Master Settlement Agreement or deposit a specified amount of funds into an escrow account each year. Manufacturers that choose to deposit funds into an escrow account are entitled to receive the interest or other appreciation earned by those funds while they remain in the escrow account. Funds that are not paid out in judgments or settlement based on the manufacturer's liability are returned to the manufacturer after 25 years.

These Qualifying Statutes have been challenged on equal protection grounds and upheld as constitutional. For example, in *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1207 (C.D. Cal. 2000), nonsettling manufacturers argued California's Qualifying Statute was not rationally related to any legitimate government objective. But the court upheld the statute, deferring to the legislature's determination that the statute was necessary to guarantee

a source of recovery in potential future lawsuits against the nonsettling manufacturers. *Id.* The court also held that reducing the total quantity of inexpensive cigarettes available within the state was "a rational response to a known health threat." *Id.* at 1207-08. Similarly, in *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 351 (4th Cir. 2002), the court acknowledged that Virginia's Qualifying Statute created distinctions among manufacturers based on whether the manufacturer joined in the Master Settlement Agreement. But the court held those distinctions were rationally related to Virginia's legitimate purpose of recovering from all manufacturers the state's future costs related to cigarette smoking. *Id.* As to the nonsettling manufacturers' complaint that they were required to pay more than the settling manufacturers, the court noted that the settling manufacturers had agreed to conduct restrictions to which the nonsettling manufacturers were not subject. *Id.* at 352-53. As the court observed, the nonsettling manufacturers were free to manufacture and market their products as they chose, but by paying funds into escrow they were essentially providing a surety bond against future liability for tobacco-related health care costs. *Id.* at 352. *See also S & M Brands*, 393 F. Supp. 2d at 604 (stating that Tennessee's Qualifying Statute did not violate the Equal Protection clause even if nonsettling manufacturers are treated differently because the distinctions between the nonsettling and settling manufacturers were rational and related to a legitimate purpose).

Although the model Qualifying Statute requires nonparticipating manufacturers to make escrow payments that approximate the payments made by participating manufacturers, the amounts paid with respect to appellants' products under Minn. Stat. § 297F.24 – 1.75¢ per

cigarette, 35¢ per pack – are substantially less than the amounts paid by the Majors. Moreover, the payments are not intended to be available to pay any judgment or settlement for past, present, or future misconduct in the marketing or selling of appellants' cigarettes. Their purpose is simply to reimburse the state, in part, for known future health care costs attributable to the use of the cigarettes and to discourage cigarette use by those who are under age. We will not second-guess a legislative tax classification that is not arbitrary and that has a reasonable basis in fact.

For these reasons, we hold that the Act does not violate the Uniformity Clause of the Minnesota Constitution and does not violate appellants' equal protection rights.

IV.

Nor does Minn. Stat. § 297F.24 constitute a bill of attainder. In *Reserve Mining Co. v. State*, 310 N.W.2d 487, 490 (Minn. 1981), we defined a bill of attainder as a statute that "specifically singles out an identifiable group or individual for the infliction of punishment by other than judicial authority." Appellants argue the statute is a bill of attainder because it "applies only to designated entities," presumably appellants. In *Reserve Mining*, we rejected the argument that a tax that applied only to taconite tailings not deposited on land in accordance with permits was a bill of attainder. *Id.* at 492. We did so even though the tax, in practice, affected only Reserve Mining – the only taconite producer at the time still dumping taconite tailings into Lake Superior. *Id.* at 490. Here, the statute in question, on its face, requires a payment with respect to all

cigarettes, and the categories of cigarettes exempt from the tax are defined broadly. If this statute constitutes attainder, which it does not, so does every statute that requires payments with respect to some products and not others.

Nor are the payments imposed by the statute "punishment" exacted on appellants for their refusal to settle with the state. Again, at 35¢ per pack, the fee imposed on appellants' products is only about half what the Majors pay and about two-thirds of that imposed on other settling manufacturers – hardly punishment for refusing to settle.

We conclude that Minn. Stat. § 297F.24 does not violate appellants' rights under the First Amendment, does not violate appellants' right to equal protection under the United States Constitution or uniformity under the Minnesota Constitution, and does not constitute a bill of attainder under either constitution.

Affirmed.

ANDERSON, RUSSELL A., C.J., and GILDEA, J., took no part in the consideration or decision of this case.

DISSENT

MEYER, Justice (dissenting).

Because I would conclude that even under a rational basis standard of review the statute fails a Uniformity Clause challenge, I respectfully dissent.

I.

In my view, the Act must be viewed in light of the litigation that gave rise to it. The state's 1994 lawsuit against the major cigarette manufacturers and their trade associations traces its origins to the formation of the Tobacco Institute and the Tobacco Industry Research Committee, later renamed the Council for Tobacco Research. In its 1994 lawsuit, the state alleged that, by forming these trade associations, the tobacco industry "undertook a special and continuing duty to protect the public health by representing that it would conduct and disclose unbiased and authenticated research on the health risks of cigarette smoking." The state alleged that, instead of fulfilling that obligation, the trade associations facilitated the deception of the American public about the health effects of smoking. According to the state's complaint, there was a conspiracy among tobacco manufacturers to suppress independent research on the adverse health effects of smoking. The state also alleged that the industry knowingly and actively induced children and adolescents to smoke, in order to replace the approximately 400,000 individuals who die each year from smoking-related illnesses.

Thus, when the state sued the Majors in 1994, the state alleged that the defendants were responsible for health care costs incurred by the state as a result of the defendants' wrongful conduct in deceptively advertising their cigarettes and misleading the public about known health risks of smoking. And, when the state settled with the Majors in 1998, the state released the Majors from all past and future tobacco-related claims the state had, or might have, against them, including "without limitation any future claims for reimbursement for health care costs

allegedly associated with use of or exposure to [t]obacco [p]roducts."

II.

Against this historical backdrop, I begin my analysis of the statute with appellants' challenge under the Uniformity Clause. Like the majority, I apply the rational basis standard of review. *See Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000). Under that standard, the statute must satisfy three tests:

> (1) the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law, that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn. 1979). And, like the majority, I address the last test first, because the purpose of the statute is relevant to analysis of the first two tests.

I generally agree that the state has a legitimate interest in curbing the health care costs associated with cigarette smoking. The Minnesota Department of Health estimates that "[s]moking costs Minnesota approximately $1.3 billion annually, the equivalent of approximately

$3.36 for every pack of cigarettes sold, or $277 per Minnesota resident per year." Minnesota Department of Health, *Preventing and Reducing Tobacco Use* at 1 (updated Dec. 9, 2003), http://www.health.state.mn.us/divs/Lped/tpc/background/html. Because smoking imposes substantial health care costs on the state, it is legitimate for the state to impose a fee on the products that generate those costs to recover some or all of those costs.[1] Indeed, appellants do not appear to challenge the authority of the state to tax cigarettes – all cigarettes, that is – to recoup costs that result from their use. I further agree that discouraging underage smoking is a legitimate state goal and that the state may pursue that goal by reducing the availability of low-cost cigarettes through the imposition of a fee on cigarettes. The problem is that, in the Act, the legislature stated that it was addressing these general purposes only with respect to nonsettlement cigarettes.

That brings into issue the other two rational basis factors. The first element of the rational basis test asks whether the distinctions between those required to pay the fee and those exempt from paying the fee are genuine and substantial, rather than arbitrary and fanciful. The court of appeals described the two classes created by the Act simply as settling manufacturers, on the one hand, "[who] are making annual payments," and nonsettling manufacturers, on the other hand, "[who] are not." *Council of Indep. Tobacco Mfrs. of America v. State*, 685 N.W.2d 467, 474 (Minn. App. 2004). Similarly, the state argues that, absent the fees imposed by the Act, nonsettlement manufacturers

[1] Like the majority, I use the terminology adopted by the statute, and take no position on whether the payments required by either the Act or the tobacco settlement are "fees" or "taxes."

are not required to pay for the health care costs created by their products, whereas the Majors have internalized those costs in the form of their required settlement payments. While true, these descriptions do not fully describe the distinctions between the two classes. It is more complete to say that the class exempt from the fee is cigarette manufacturers who were sued by the state for fraud and deceptive trade practices, whose unlawful actions were alleged to be the cause of increased health care expenditures incurred by the state, and whose payments to the state are based on their settlement of those allegations of unlawful conduct.[2] In contrast, the class subject to the cigarette fee is manufacturers who were not sued by the state and as to whom no allegations of unlawful conduct have been either made or settled by the state.

Thus, because nonsettling manufacturers such as appellants were not sued for increasing health care costs by engaging in illegal conduct, they can charge less for cigarettes but must pay the fee, whereas settling manufacturers like the Majors are exempted from the fee because they are making payments under a settlement by which they avoided potential liability for increased health care costs caused by their alleged wrongful conduct. In essence, the legislature has attempted to treat those disparate situations similarly under the Act by imposing a fee on nonsettling manufacturers' products that is intended to put their cigarettes in a financial posture comparable to

[2] The state agreed at oral argument that the state does not have the authority to compel tobacco manufacturers, through litigation, to make payments for health care costs. Indeed, each count of the complaint linked the liability of the Majors not to the health care costs incurred by the state as a result of tobacco use generally, but to increased health care costs caused by their illegal conduct.

those of settling manufacturers. In this sense, the question is whether the similarities between the two classes, rather than the distinctions, are genuine and substantial. *Cf. Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike * * * "). I conclude they are not.

The contrast between this Act and the model qualifying statute created in the Master Settlement Agreement is illuminating. Six months after the Minnesota settlement agreement, 46 states and 6 U.S. territories also settled their lawsuits against the major tobacco manufacturers by entering into the "Master Settlement Agreement." Like the Minnesota settlement, the Master Settlement Agreement requires the major tobacco manufacturers to make large settlement payments over time, to make additional annual payments in perpetuity, and to agree to certain restrictions on lobbying and advertising activities. In exchange, each participating state agreed to release the participating tobacco manufacturers from present and future claims.

The Master Settlement Agreement anticipates that, as the major tobacco manufacturers raise their prices to cover the costs of the national settlement, other tobacco manufacturers will gain market share. Therefore, the Master Settlement Agreement encourages all participating states to enact a "qualifying statute," the purpose of which is to neutralize the competitive advantages that a nonparticipating tobacco manufacturer would otherwise enjoy as a result of the increased costs incurred by the participating tobacco manufacturers in the form of settlement payments. A model qualifying statute was included as an exhibit to the Master Settlement Agreement. Subsection

(f) of the Findings and Purposes section of the model qualifying statute provides that:

> It would be contrary to the policy of the State if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the State to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

All manufacturers of tobacco products are required under the model qualifying statute either to become a participating manufacturer (by agreeing to perform the obligations of the Master Settlement Agreement) or to place a specified amount of funds into a qualified escrow account each year. Those manufacturers that choose to deposit funds into an escrow account are entitled to receive the interest or other appreciation of those funds while they remain in the escrow account. The model qualifying statute provides three circumstances under which the funds in the escrow account may be released: (1) to pay a judgment or settlement won by the state against the manufacturer; (2) to reimburse the manufacturer for deposits in excess of what it would have paid had it been party to the Master Settlement Agreement; or (3) if there has been no judgment or settlement based on the manufacturer's liability, the funds are returned to the manufacturer after 25 years. As noted, the Master Settlement

Agreement encourages participating states to pass the model qualifying statute; if a state does not pass such a statute, its continuing settlement payments are reduced.

The goal of the model qualifying statute is similar to that of Minnesota's Act: to put settling and nonsettling manufacturers in a comparable competitive position in pricing their cigarettes. But the payments required of nonsettling manufacturers under the model qualifying statute are premised on potential liability of those manufacturers for wrongdoing, and the escrowed funds are returned to the manufacturer if it is not found liable or does not settle a suit against it within 25 years. Indeed, because of this significant distinction between the Act and the model qualifying statute, the cases cited by the majority that uphold state-enacted model qualifying statutes provide no guidance on this issue.

Here, the classification seeks to use the cigarette fee as a means of compelling cigarette manufacturers that were not sued by the state to bear, one way or another, financial burdens comparable to those borne by manufacturers that were sued by the state. Put another way, the state is imposing a new fee on certain cigarette manufacturers' products in order to reduce the differential between the sale price of cigarettes manufactured by settling manufacturers and the sale price of cigarettes manufactured by companies that have not settled with the state.

Allegations of wrongdoing underlie the entire tobacco lawsuit and its settlement. In contrast, the statute at hand alleges no wrongdoing against appellants but, nevertheless, seeks to compel them to make payments comparable to those made by the settling manufacturers. This statute exempts from taxation one segment of the industry that

settled a lawsuit alleging illegal activity, while imposing a tax that is comparable to settlement payments upon a separate segment of the industry that was not sued by the state. Such a classification creates a distinction that is not a genuine and substantial basis for disparate treatment of settling and nonsettling manufacturers within the tobacco industry.

Despite the strong presumption in favor of the constitutionality of statutes and the low hurdle imposed by the rational basis standard, where that standard has not been met both the Supreme Court and this court have struck down taxes as violative of the Equal Protection and Uniformity Clauses. *See Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989) (recognizing that the imposition of differing tax burdens upon similarly situated parties must be reasonable); *Nat'l Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939) (taxing "different persons" at "different rates" for the "privilege of doing the same act," *id.* at 446, 286 N.W. at 361, violates the Uniformity Clause). The Act's attempt to equate payments that emanate from settlement of litigation alleging illegal conduct with a fee that has no connection with wrongful conduct fails the rational basis test, and therefore I would hold that the Act violates the Uniformity Clause.

I therefore respectfully dissent.

685 N.W.2d 467

STATE OF MINNESOTA
IN COURT OF APPEALS
A03-2020

Council of Independent Tobacco Manufacturers of America, et al.,
Appellants,

vs.

The State of Minnesota, et al.,
Respondents.

Filed August 24, 2004
Affirmed
Robert H. Schumacher, Judge

Ramsey County District Court
File No. C1037120

Thomas H. Boyd, Karl E. Robinson, Winthrop & Weinstine, P.A., Suite 3500, 225 South Sixth Street, Minneapolis, MN 55402-4629; and

Anthony F. Troy, Troutman Sanders, LLP, Post Office Box 1122, Richmond, VA 23218-1112 (for appellants)

Mike Hatch, Attorney General, Hilary Lindell Caligiuri, Deputy Attorney General, Bradford S. Delapena, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2128 (for respondents)

Walter A. Pickhardt, Faegre & Benson, LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 (for amicus curiae Brown & Williamson Tobacco Corporation)

Considered and decided by Stoneburner, Presiding Judge; Schumacher, Judge; and Forsberg, Judge.*

SYLLABUS

1. Minn. Stat. § 297F.24 (Supp. 2003), does not unconstitutionally abridge the First Amendment rights of tobacco distributors and manufacturers who are not parties to the settlement of the state's tobacco suit, *State by Humphrey v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 8, 1998).

2. Minn. Stat. § 297F.24 does not violate the Equal Protection Clause or the state's uniformity clause by taxing distributors of cigarettes manufactured by non-settling manufacturers.

3. Minn. Stat. § 297F.24 is not an unlawful bill of attainder.

4. Minn. Stat. § 297F.24 does not violate the state constitution's prohibition against special legislation.

OPINION

ROBERT H. SCHUMACHER, Judge.

Appellants Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Company, and Winner Tobacco Wholesale, Inc. brought this action to prohibit enforcement of Minn. Stat. § 297F.24 (Supp. 2003), alleging that the statute violates the First Amendment, Equal

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Protection and state uniformity clauses. Appellants further contend that the statute is a bill of attainder and unconstitutional special legislation.

Minn. Stat. § 297F.24 is not a direct attempt to regulate speech but has a legitimate legislative purpose and therefore is not an infringement of appellants' rights to free speech. The statute creates classifications based on genuine and substantial distinctions, does not violate the Equal Protection or state uniformity clauses, and is not special legislation. Finally, because the statute seeks to regulate prospective rather than past conduct, it is not a bill of attainder. We affirm.

FACTS

Appellants are manufacturers and distributors of cigarettes who were not parties to *State by Humphrey v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 8, 1998), which ended in settlement in May 1998. In that matter, the state sued Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Co., the so-called "major manufacturers," as well as Liggett Group, Inc., asserting claims for costs associated with the tobacco companies' conduct in denying the deadly and addictive nature of their products and attempting to conceal this information.

The state settled with Liggett on March 20, 1997. Liggett agreed to make annual payments of $100,000, publicly acknowledge the dangers of nicotine, restrict its advertising, and cooperate with the state in its action against the major manufacturers. After trial, but before a verdict was returned, the state entered into a settlement

agreement with the major manufacturers ("Minnesota settlement").

Broadly stated, the major manufacturers agreed to make six one-time payments, as well as annual payments in perpetuity, amounting to approximately $6.1 billion over 25 years. The annual payment amount is based on the national market share of each of the major manufacturers. In addition, the major manufacturers agreed not to oppose legislative proposals designed to reduce tobacco use by children, to challenge certain existing laws or rules governing tobacco, or to support national legislation designed to override the settlement agreement. The major manufacturers further agreed to discontinue advertising on billboards and in transit facilities, refrain from paying for product placement in movies, and cease sales of products bearing logos of their products. In return for these agreements, the state agreed to release the major manufacturers from all past and future tobacco-related claims.

Six months after the Minnesota settlement, 46 states and 6 United States territories settled with the major manufacturers in the "Master Settlement Agreement." Like the Minnesota settlement, the Master Settlement Agreement involved settlement payments, annual payments in perpetuity, and restrictions on lobbying and advertising activities in exchange for releases from claims. The Master Settlement Agreement also permits manufacturers other than the majors to join in the settlement by making annual payments. The Master Settlement Agreement encouraged all participating states to draft a "qualifying statute" which would neutralize the cost advantages a non-participating manufacturer would otherwise enjoy.

Within four years after the Minnesota settlement, the market share of the major manufacturers had fallen from about 98% to about 88% of the state market. Smaller manufacturers not party to the settlement agreement had apparently been able to capture a much larger share of the market based on lower prices. In 2003, the state legislature enacted Minn. Stat. § 297F.24 (Supp. 2003) to counteract this trend. This statute imposes a 1.75¢ per cigarette or 35¢ per pack fee on cigarettes, payable by distributors of tobacco products that are manufactured by companies not subject to the Minnesota settlement. The stated purposes of the statute are to make "non-settlement" cigarette manufacturers pay fees comparable to the costs attributable to the use of their cigarettes, prevent non-settlement manufacturers from undermining the state's policy of discouraging youthful smokers by supplying low-priced cigarettes, and fund other appropriate purposes. Minn. Stat. § 297F.24, subd. 1(b)(1)(2)(3).

The statute permits a manufacturer not a party to the Minnesota settlement to voluntarily enter into an agreement with the state on similar terms. Minn. Stat. § 297F.24, subd. 2(2). Respondent Dan Salomone, in his official capacity as the Commissioner of the Minnesota Department of Revenue, has interpreted this to mean that the nonparty manufacturer must make annual payments equal to at least 75% of the payments required from parties to the original agreement and must also agree to the lobbying and advertising restrictions. As of September 2003, the 75% payment would be equal to 48¢ per pack, but the manufacturer would not have to pay the 35¢ fee otherwise imposed by the act. Respondent State of Minnesota would be obligated to release the manufacturer from all past and future tobacco-related claims.

The model act proposed by the Master Settlement Agreement provides that monies collected under the qualifying statute from non-participating manufacturers would be escrowed for 25 years to provide a fund for payment if a state successfully sues a non-participating member for health-care costs. If no costs accrue over the 25-year period, the money is returned to the non-participating manufacturer. The Minnesota law, on the other hand, acts like an excise tax; the money collected through the 35¢ fee belongs to the state and can be used for general purposes. Further, the fee is collected from distributors, not manufacturers, and will not be returned to the distributor. In theory, although the tax is on distributors, a non-settling manufacturer will be forced to raise the price of its cigarettes to cover the fee, thus decreasing the economic advantage of the non-settling manufacturers.

Appellants sought a temporary restraining order and temporary injunction to prohibit enforcement of the statute. The district court denied appellants' motions. Both appellants and respondents made cross-motions for summary judgment. The district court denied appellants' motion and granted summary judgment to respondents.

ISSUES

1. Is Minn. Stat. § 297F.24 (Supp. 2003), an unconstitutional abridgement of appellants' First Amendment rights?

2. Does Minn. Stat. § 297F.24 violate principles of equal protection or the state's uniformity clause?

3. Is Minn. Stat. § 297F.24 unlawful under the United States Constitution or the Minnesota Constitution as a bill of attainder?

4. Is Minn. Stat. § 297F.24 a violation of the Minnesota Constitution's prohibition against special legislation?

ANALYSIS

1. We evaluate a statute's constitutionality as a matter of law. *Granville v. Minneapolis Pub. Schs., Special Dist. No. 1*, 668 N.W.2d 227, 230 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). Statutes are presumed to be constitutional. *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 93 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000). If the constitutional challenge involves a fundamental right, the reviewing court applies a strict scrutiny analysis. *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 796 (Minn. 1999). If no fundamental right is involved, an appellate court reviews the statute under a rational basis standard. *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002).

The first question is whether Minn. Stat. § 297F.24 (Supp. 2003), abridges appellants' First Amendment right of free speech, a fundamental right.[1] A government entity

---

[1] Appellants argue that the district court erred by placing the burden of proof on them rather than respondents. When a statute infringes on First Amendment rights, the government bears the burden of proving the constitutionality of the statute. *Kismet*, 617 N.W.2d at 93. This is true even where the restriction impinges on commercial speech, which is generally accorded a lesser standard of protection. *State by Humphrey v. Casino Mktg.*, 491 N.W.2d 882, 885 (Minn. 1992). Even assuming, however, that the district court erred in placing the burden

(Continued on following page)

"may not condition a tax exemption on the renunciation of an individual's right to free speech." *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1206 (C.D. Cal. 2000) (citing *Speiser v. Randall*, 357 U.S. 513, 518, 78 S. Ct. 1332, 1338 (1958)). But the usual case where an unconstitutional tax exemption is found involves a direct attack on speech, rather than limitation as a collateral consequence. *See FCC v. League of Women Voters*, 468 U.S. 364, 383-84, 104 S. Ct. 3106, 3119 (1984) (requiring ban on editorial speech on public broadcasting stations in order to maintain tax-exempt status); *Speiser*, 357 U.S. at 518, 78 S. Ct. at 1338 (requiring oath from veterans that they have not advocated overthrow of government before grant of tax exemption).

The United States Supreme Court stated that although lobbying is speech, a government entity need not provide a tax exemption, which the Court described as a subsidy, in order to permit an individual to more fully exercise the protected right. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S. Ct. 1997, 2001 (1983). The Court noted: "We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549, 103 S. Ct. at 2003. The Court stated: "Where governmental [denial of a tax exemption] is not aimed at the suppression of dangerous ideas, its power to encourage actions deemed to be in the public interest is necessarily far broader." *Id.* at 550, 103 S. Ct. at 2003 (citation and quotation omitted). The Court went on to examine the

---

of proof on appellants, this court can still evaluate the merits of this appeal, applying the appropriate standard. *See id.* at 885-86.

organization's claims using a rational basis standard, concluding that Congress had a rational reason to limit tax-free status. *Id.* at 549-50, 103 S. Ct. at 2003.

Thus, where a statute has a legitimate purpose that is not a direct attempt to stifle speech, the court applies a rational basis review standard. Applying that standard, the purpose of Minn. Stat. § 297F.24, as set forth in subdivision 1(b), is to require non-settlement manufacturers to pay fees comparable to the costs incurred by the state that are attributable to the use of cigarettes and to prevent non-settlement manufacturers from flooding the state with cheap cigarettes, thereby undermining the state's policy of discouraging youth smokers. This is a legitimate purpose within the state's power and, because it is not a direct attempt to regulate speech, does not offend the First Amendment.

2. This court reviews claims under the Equal Protection and state uniformity clauses to decide whether the classification is rationally related to a legitimate government interest. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7, art. X, § 1; *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 348 (4th Cir. 2002). Under Minnesota decisions, the rational basis test requires:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed

> remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Westling v. County of Mille Lacs, 581 N.W.2d 815, 820 (Minn. 1998) (quoting *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979)).

"[C]ourts are especially deferential in the context of classifications made by complex tax laws." *John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue*, 497 N.W.2d 250, 253 (Minn. 1993) (quotation omitted); *see also Regan*, 461 U.S. at 547, 103 S. Ct. at 2002 ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). Even where the effect on particular groups within a class is uneven, there is no constitutional violation so long as the basic classification is reasonable. *John Hancock*, 497 N.W.2d at 253.

Here, the two classifications are settling and non-settling manufacturers. Using the rational-basis test, we first address whether the distinctions between the two are reasonable. Settling manufacturers are making annual payments in perpetuity, while the non-settling manufacturers are not. This provides a reasonable basis for the distinction that is not manifestly arbitrary or fanciful.

As to the second factor, whether the classification is relevant to the purpose of the law, the stated purpose of the law is to discourage the sale of cigarettes at prices attractive to youthful smokers and to compel the non-settling manufacturers to pay fees comparable to the costs incurred by the state from the sale and use of cigarettes. As the state points out, the settling manufacturers are providing annual payments that provide a source of revenue to the state to use for preventative purposes and

recovery of health costs and that also force the price of their cigarettes to remain higher and thus less attractive to youthful smokers. Without the cigarette fee, the non-settling manufacturers avoid assuming responsibility for the hidden costs of smoking and can maintain their prices at a lower level. Thus, the classification is relevant to the purposes of the law.

The third prong of the analysis, whether the purpose is something the state can legitimately hope to achieve, is subject to extremely deferential review. *Westling,* 581 N.W.2d at 822. Unless the purpose is "invidious or arbitrary," it will be sustained. *Id.* The purpose of Minn. Stat. § 297F.24 is related to the health and well-being of its citizens, particularly youth, which is a legitimate interest of the state.

The state's classifications are rationally related to a legitimate state purpose and do not offend either the Equal Protection Clause or the state uniformity clause.

3. Both the United States Constitution and the Minnesota Constitution prohibit passage of any bill of attainder. U.S. Const. art. I, § 11; Minn. Const. art. I, § 11. A bill of attainder is defined as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468, 97 S. Ct. 2777, 2803 (1977). The prohibition against bills of attainder is grounded in the separation of powers doctrine; it is designed to prevent a legislative body from usurping the role of the judiciary by legislatively determining issues of guilt and punishment. *Id.* at 469, 97 Sect. at 2803.

Generally, a bill of attainder requires proof of three things: (1) singling out or specification of an identifiable individual or group; (2) punishment; and (3) lack of a judicial trial. *Selective Serv. Sys. v. Minn. Pub. Interest Research Group,* 468 U.S. 841, 847, 104 S. Ct. 3348, 3352 (1984). Although it is not unlawful per se to single out a group for a legislative purpose, it is unlawful to single out a group for punishment based on past conduct. *Id.* Thus, if a law is intended to legislatively punish an individual or group solely because of past conduct, it is a bill of attainder. *Id.* But if an affected group can escape the regulation by altering their conduct, the proscription is not a bill of attainder, because it addresses future, not past, conduct. *WMX Techs., Inc. v. Gasconade County,* 105 F.3d 1195, 1202 (8th Cir. 1997).

To determine if a law has a punitive purpose, a court makes three inquiries: (1) whether the law imposes punishment such as death, imprisonment, banishment, confiscation of property, or barring participation in certain employment or occupations; (2) whether the law furthers a non-punitive legislative purpose; and (3) whether the legislative body had a punitive motive in passing the law. *Id.* at 1202-03.

First, appellants here are not barred from engaging in their chosen occupations. They may sell cigarettes and pay a tax, refrain from selling in the state, or join in the settlement agreement. A legislative prohibition is not a bill of attainder if it can be avoided by simply not engaging in the affected conduct. *See Selective Serv. Sys.,* 468 U.S. at 856-57, 104 S. Ct. at 3357.

Next, the statute sets forth two primary legislative purposes: to discourage youthful smokers by preventing

cigarettes from being too attractively priced and to recover some of the state's costs resulting from cigarette smoking. Minn. Stat. § 297F.24, subd. 1(b). Neither of these purposes have a punitive intent.

Finally, a legislative body's punitive motivation can be inferred if the law suggests intent to punish an affected party for past conduct. *WMX*, 105 F.3d at 1203. Once again, this law applies to future sales of cigarettes and is not based on appellants' past conduct. Although the law requires appellants to pay taxes not previously imposed on them, "[f]orbidden legislative punishment is not involved merely because [an act] imposes burdensome consequences." *Nixon*, 433 U.S. at 472, 97 S. Ct. at 2805.

Because the statute is not punitive in nature and seeks to regulate future rather than past conduct, we conclude that it is not a bill of attainder.

4. Appellants also argue that Minn. Stat. § 297F.24 is unlawful because it violates the prohibition against special legislation. Article 12, section 1 of the Minnesota Constitution states:

> In all cases when a general law can be made applicable, a special law shall not be enacted. . . . Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever.

Although the legislature is prohibited from enacting special legislation, it is nevertheless lawful to create different classes and apply different rules to them, so long

as the classification is based on substantial distinctions. *In re Tveten*, 402 N.W.2d 551, 558 (Minn. 1987). In order to determine whether an appropriate classification has been made, the reviewing court applies a three-part rational basis test:

> (a) the classification applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation; (b) the distinctions are not manifestly arbitrary or fanciful but are genuine and substantial so as to provide a natural and reasonable basis justifying the distinction; and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Id. at 558-59 (quotation omitted).

This review is similar to the standard applied above on the equal protection/uniformity question. We have already concluded that the classifications in the statute between settling manufacturers, who pay annual fees that subsidize the costs to the state of smoking and act to raise cigarette prices to discourage youthful smokers, and non-settling manufacturers, who do not, create a genuine and substantial distinction tied to a legitimate state interest. As such, Minn. Stat. § 297F.24 is not special legislation prohibited by the Minnesota Constitution.

DECISION

Minn. Stat. § 297F.24 (Supp. 2003) does not abridge appellants' First Amendment rights or violate the Equal Protection and state uniformity clauses and is neither a

bill of attainder nor special legislation in violation of the Minnesota Constitution.

Affirmed.

/s/ Robert H. Schumacher
8/17/04

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Company, and Winner Tobacco Wholesale, Inc.

Plaintiff,

VS.

The State of Minnesota and Dan Salomone, in his official capacity as the Commissioner of the Minnesota Department of Revenue

Defendants.

File No. C1-03-7120

ORDER

(Filed Nov. 19, 2003)

The above-entitled matter came on for hearing before the **Honorable John T. Finley** on the 6th day of October, 2003, pursuant to motions for summary judgment that were filed by both plaintiffs and defendants.

The plaintiffs were represented by **Karl E. Robinson, Esq.**, of Winthrop and Weinstine, P.A. The defendant State of Minnesota was represented by **Bradford S. Delapena,** Esq., of the State Attorney General's Office.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. That the plaintiffs' motion for summary judgment is hereby **DENIED**.

2. That the defendants' motion for summary judgment is hereby **GRANTED**.

3. That the plaintiffs' cause of action against the defendants is hereby **DISMISSED WITH PREJUDICE**.

4. The attached Memorandum is made a part of this order pursuant to Minnesota Rules of Civil Procedure 52.01.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 18, 2003.

BY THE COURT:

/s/ John T. Finley
John T. Finley
Judge of District Court

JUDGMENT

The foregoing shall constitute the judgment of the Court.

Entered: 12/1/03

cc: Karl E. Robinson
Bradford S. Delapena

MICHAEL G. MORIARITY
Court Administrator

By /s/ Barbara Hanggi
Deputy Clerk

MEMORANDUM

FACTS

The defendant State of Minnesota entered into an agreement with the major tobacco manufacturers, herein after called Majors, in order to settle a lawsuit styled as *State of Minnesota vs. Philip Morris, Inc.*, File No. C1-94-8465, filed in the Second Judicial District, Ramsey County, Minnesota.

In May 1998, before the jury could return a verdict, the Majors and the State of Minnesota entered into an agreement which required annual payments from the

Majors beginning on December 31, 1998 and thereafter annually in an amount equal to pro rata portion of their respective market shares based on an increase formula starting at $4 billion in 1998 and going up to $8 billion in 2003 and thereafter. There was an increase equal to the consumer price index or 3 percent beginning in 1999.

Since the settlement, a small group of manufacturers, hereinafter called nonparticipating manufacturers (NPN), not included in the settlement agreement because they were not named defendants in their market share and therefore did not have to make any payments. Their market share increased in the state of Minnesota from approximately 2 percent to approximately 10 percent since 1998.

In 2003, the Minnesota state legislature passed Minnesota Statutes 295F.24, which imposed a fee of 1.75 cents per cigarette on all cigarettes manufactured that did not participate in the settlement of the above-mentioned lawsuit.

The parties agreed to Stipulation of Facts, which is a more complete set of facts than that set forth herein and is a part of the record in these proceedings.

Plaintiffs claim that this law is a violation of the Equal Protection and Due Process Clause of the state and federal Constitution and constitutes a Bill of Attainder. They also claim that they were not party defendants to the previous lawsuit and have not been accused of the indiscretions that the State of Minnesota had accused the Majors of in marketing of their cigarettes.

The defendants state that the new statute was necessary to prevent nonsettlement manufacturers from

undermining the State's policy of discouraging underage smoking by offering cigarettes at substantially below the cost of the cigarettes of other manufacturers, as well as to ensure that the nonsettlement manufacturers pay fees to the State of Minnesota comparable to the cost attributed to the use of the cigarette, i.e., the increased cost of public health, and lastly, other purposes that the legislature deems appropriate.

The fee went into the general fund.

LAW

297F.24. Fee in lieu of settlement.

Subdivision 1. Fee imposed. (a) A fee is imposed upon the sale of nonsettlement cigarettes in this state, upon having nonsettlement cigarettes in possession in this state with intent to sell, upon any person engaged in business as a distributor, and upon the use or storage by consumers of nonsettlement cigarettes. The fee equals a rate of 1.75 cents per cigarette.

(b) The purpose of this fee is to:

(1) ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;

(2) prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers; and

(3) fund such other purposes as the legislature determines appropriate.

Subdivision 2. Nonsettlement cigarettes. For purposes, of this section, a "nonsettlement cigarette" means a cigarette manufactured by a person other than a manufacturer that:

(1) is making annual payments to the state of Minnesota under a settlement of the lawsuit styled as *State v. Philip Morris, Inc.*, No. C1-94-8565 (Minnesota District Court, Second Judicial District), if the style of cigarettes is included in computation of the payments under the agreement; or

(2) has voluntarily entered into an agreement with the state of Minnesota, approved by the attorney general, agreeing to terms similar to those contained in the settlement agreement, identified in clause (1) including making annual payments to the state, with respect to its national sales of the style of cigarettes, equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the settlement agreement required to make annual payments to the state.

Subdivision 3. Collection and administration. The commissioner shall administer the fee under this section in the same manner as the excise tax imposed under section 297F.05 and all of the provisions of this chapter apply as if the fee were a tax imposed under section 297F.05. The commissioner shall deposit the proceeds of the fee in the general fund.

A. Due Process

The case most on point is *Star Scientific, Incorporated v. Randolph A. Beales*, 278 F. 3d 339, which required

nonparticipating manufacturers to pay a fee which contributed to offset the increased health care costs. The Court found that it was not a violation of the Due Process, Equal Protection, or Commerce Clauses. The *Star Scientific* case came about after the Majors settled what has been called the Master Settlement Agreement, which Minnesota was originally a plaintiff but later opted out to enter their own settlement agreement with the Majors. Following the Master Settlement Agreement, Virginia enacted a qualifying statute very similar to Minnesota Statute 297F.24. The *Star Scientific* case followed and the Court stated as follows:

"The Due Process Clause includes a substantive component that provides some protection against economic legislation interfering with property interests. See, e.g., *Concrete Pipe & Prods. Of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal*, 508 U.S. 602, 636-37, 113 S.Ct. 2264, 124 L.Ed. 2d 539 (1993); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). This protection, however, is severely limited. The Supreme Court has long recognized that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industry conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955); see also *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S.Ct. 1028, 10 L.Ed. 2d 93 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws").

To comport with the limited scope of substantive due process protection, economic legislation need only be rationally related to a legitimate government interest. See, e.g., *Concrete Pipe,* 508 U.S. at 637, 113 S.Ct. 2264; *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. 59, 84, 98 S.Ct. 2620, 57 L.Ed. 2d 595 (1978); *Holland v. Keenan Trucking Co.*, 102. F. 3d 736, 740 (4th Cir. 1996) ("If a piece of economic legislation 'is supported by a legitimate legislative purpose furthered by [a] rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches'") (quoting *Pension Benefit Guar. Corp. v. F.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 81 L.Ed. 2d 601 (1984). Under rational basis review, therefore, "there is no need for mathematical precision in the fit between justification and means," *Concrete. Pipe,* 508 U.S. 602, 636-37, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

The Court on *Scientific* continued its analysis and stated,

"Like the analysis used in evaluating the constitutionality of economic legislation under the Due Process Clause, an analysis of economic legislation under the Equal Protection Clause is a deferential one. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed. 2d 211 (1993). Stated otherwise, a statutory classification that neither employs inherently suspect distinctions nor burdens the exercise of a fundamental constitutional right will be

upheld if the classification is rationally related to a legitimate state interest. See, e.g., *Clover Leaf Creamery*, 449 U.S. at 461, 101 S.Ct. 715; *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). This rational basis review is "a paradigm of judicial restraint." *Beach Communications*, 508 U.S. at 314, 113 S.Ct. 2096. Thus, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it." Moreover, . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Dukes*, 427 U.S. at 304, 96 S.Ct. 2513 (internal citations omitted) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed. 2d 351 (1973).

The best case in dealing with the issue of due process is *Williamson v.. Lee Optical of Oklahoma*, cited at 348 U.S. 483, 75 S.Ct. 461, when the Court stated:

"The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia v. People of State of New York*, 291 U.S. 502, 54 S.Ct. 505, 89 A.L.R. 1469; *West Coast Hotel Co. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703; *Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; *Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632; *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L.Ed. 469. We emphasize again what

Chief Justice Waite said in *Munn V. State of Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'

B. Equal Protection

Scientific addressed violations of the Equal Protection clause as well and stated, "Turning to whether Virginia's qualifying statute violates the Equal Protection Clause, we conclude that Star Scientific has not met its very difficult burden. Although it is true that the qualifying statute creates distinctions among tobacco manufacturers based on whether a manufacturer signs the Master Settlement Agreement, the distinctions are rationally related to Virginia's legitimate purpose of ensuring a source of recovery from all manufacturers for Virginia's future costs related to cigarette smoking."

The Court in *Scientific* pointed out that revenue received was for the purpose to ensure the recovery of all future tobacco-smoking-related healthcare costs, which is similar to the need for the revenue that the State of Minnesota collects in our case which will be used for educating youth about the health hazards associated with smoking and other legitimate legislative purposes.

Scientific continued, "Under the rational basis review applicable here, we conclude that Virginia's qualifying statute is constitutional. 'States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.'" *Dukes*, 427 U.S. at 303, 96 S.Ct. 2513; see also *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 83, 120 S.Ct. 631, 145 L.Ed.

2d 522 (2000) (holding that, under rational basis review, the Equal Protection Clause does not require States "to match age distinctions and the legitimate interests they serve with razorlike precision"). Even though the tobacco manufacturers are treated differently, the differences in treatment are related to their different circumstances, allowing the State to accomplish its legitimate purposes. "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purpose that we can only conclude that the legislature's actions were irrational." *Vance V. Bradley*, 440 U.S. 93, 97, 99, S.Ct. 939, 59 L.Ed. 2d 171 (1979).

Scientific continued to state that "[t]he distinction between participating manufacturers and nonparticipating manufacturers is rationally related to Virginia's efforts to redress an alleged wrongdoing and, at the same time, to assure a future source for covering the costs of cigarette smoking from all tobacco manufacturers." This is quite similar to Minnesota, the wrongdoing being the stated purpose in the statute, i.e., to discourage underage smoking and to use the funds for matters which the legislature deems appropriate.

Scientific also alleged its innocence similar to what the defendants are doing in our case. The Court stated as follows:

"Today, it is generally recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 2430, 150 L.Ed. 2d 532 (2001) (internal quotation marks and citation omitted). The costs

attributable to this major public health issue are borne by various constituencies, including the States. Through years of lawsuits and settlement agreements, the States and the major tobacco companies have finally reached an agreement broadly addressing the public health threat, and this agreement, if it is to be effective, necessarily has implications beyond the parties, reaching nonsettling tobacco companies, such as Star Scientific.

"Regardless of Star Scientific's innocence in any alleged wrongdoing – allegations that made the Master Settlement Agreement with the major manufacturers possible – Star Scientific remains a tobacco company whose products continue to threaten the public health. For that reason alone, its inclusion in a legislative scheme to establish financial responsibility for this public health issue is not inherently irrational. Indeed, it falls squarely within the States' police power to promote the public health, safety, welfare, and morals of the State. See *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954). Star Scientific might rightly claim innocence as to past wrongdoing and might even be justified in claiming credit for its efforts to educate would-be smokers about the adverse effects of smoking and for its efforts to reduce, through research, cancer-causing toxins in cigarettes. But it cannot deny that it is a cigarette manufacturer whose products will continue to threaten the public health."

Star Scientific, like the plaintiffs in this case, argue that they were not accused of wrongdoing. However, by having prices lower than those that were targeted for wrongdoing, plaintiffs become at least as much of a risk to the public health in the encouragement of underage

smoking as the Majors because they are selling their products at a reduced price. The reduced price encouraged more smoking by youth when the policy of the State of Minnesota is to discourage youth from smoking. The Minnesota legislature can establish financial responsibility for the public health issue, the same as Virginia did in Scientific.

In *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 101 S.Ct. 715, the Court stated as follows:

"States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' *Vance v. Bradley*, 440 U.S., at 111, 99 S.Ct., at 950. See also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425, 72 S.Ct. 405, 408, 96 L.Ed. 469 (1952); *Henderson Co. v. Thompson*, 300 U.S. 258, 264-65, 57 S.Ct. 447, 450-51, 81 L.Ed. 632 (1937).

"Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938), they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." *Id.*, at 154, 58 S.Ct., at 784. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation

merely by tendering evidence in court that the legislature was mistaken."

A similarity with *Philip Morris* is also on the issue of the Equal Protection Clause wherein the Court stated:

"Under the rational basis test, parties challenging a statute on equal protection grounds "cannot prevail so long as . . . the question [of rationality] is at least debatable." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981). The Qualifying Statute is indisputably rationally related to a permissible state objective. The Statute requires that all tobacco manufacturers, including distributors of repatriated cigarettes, join the M.S.A. or pay into an escrow account to fund potential liability claims. The state legislature has determined that such a statute is necessary to guarantee a source of recovery for judgments and settlements in potential future suits against tobacco product manufacturers electing not to participate in the MSA. See M.S.A. Ex. T at T-1 ("It would be contrary to the policy of the State if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably.") Plaintiffs claim that the Qualifying Statute is not rationally related to its stated purpose – ensuring that the state can recover for any future liability judgment because they are immune from any products liability action. As noted above, that proposition is incorrect because Cal. Civ. Code 1714.45(e) provides that tobacco companies, or their successors in interest, are not immune from actions brought by a public entity. See Cal. Civ. Code 1714.45(e). [FN28]"

Determining whether or not there has been a violation of the Equal Protection Clause one should look at several Supreme Court cases which have been cited by the parties, including *City of New Orleans v. Nancy Dukes*, 427 U.S. 297, 96 S.Ct. 2513 (1976). *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 113 S.Ct. 2096, as well as the *State of Minnesota v. Clover Leaf Creamery Co.*, cite 449 U.S. 456, 107, S.Ct. 715.

In *Dukes* the Supreme Court stated: "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, E.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed. 2d 351 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed. 2d 828 (1966), in such economic areas, adopting regulations that only partially ameliorate perceived evil and deferring complete elimination of the evil to future regulations. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955).

In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative

policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g., *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See. E.g., *Ferguson v. Skrupa,* 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963), [FN5]"

In *Philip Morris,* as in our case, there is a claim of violation of free speech. But even in *Philip Morris* where the fee was not tax deductible, the Court found that the speech restrictions were wholly separate than the tax consequences. In our case, the funds are tax deductible because the fee imposed on the nonparticipating members are deductible similar to the tax paid by the Majors. The argument regarding allegations that plaintiffs rights to free speech fail. Again, this Court cannot supplant its judgment for legitimate legislative policy

C. Bill of Attainder

The plaintiffs' arguments regarding bill of attainder have been dealt with very specifically in *PTI, Inc. v. Philip Morris Incorporated,* 100 F. Supp. 2d 1179 (2000). The Court stated as follows:

"To make out a bill of attainder violation, a plaintiff must meet three requirements: "Specification of the affected persons, punishment, and lack of a judicial trial." *United States v. Munsterman,* 177 F. 3d 1139, 1141 (9th Cir. 1999) (quoting *Selective Serv. Sys.*, 468 U.S. at 847, 104 S.Ct. 3348, 82 L.Ed. 2d 632 (1984). Plaintiffs have met

neither the specificity nor the punishment prong of the test.

To meet the specification requirement, a claimant must show more than that the challenged law "merely designates a properly general characteristic." *Munsterman,* 177 F 3d at 1142.

"Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire further whether [the legislature] 'inflict(ed) punishment' within the constitutional proscription against bills of attainder." *Nixon,* 433 U.S. at 472-73, 97 S.Ct. 2777.

"The Supreme Court has developed three tests to determine whether a particular statute inflicts punishment: the historical test, the functional test, and the legislative motivation test. See *Selective Service Sys.*, 468 U.S. at 852, 104 S.Ct. 3348; *Nixon,* 433 U.S. at 473-80, 97 S.Ct. 2777. Under the historical test, courts inquire whether the legislative enactment meets the historical meaning of punishment – "deprivation and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription" against bills of attainder *Nixon,* 433 U.S. at 473, 97 S.Ct. 2777. Such punishments included death, "imprisonment, banishment, and the punitive confiscation of property by the sovereign." *Id* at 474, 97 S.Ct. 2777 (citation omitted). The statutory scheme created by the Qualifying Statute, in which a tobacco product manufacturer either joins the M.S.A. or pays into an escrow account, [FN22] does not even arguably qualify as one of these types of punishment."

"Under the functional test, courts inquire whether the challenged law "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Id* at 475-76, 97 S.Ct. 2777. For the reasons cited above, the Qualifying Statute, on its face, furthers the nonpunitive legislative purposes enumerated in the MSA. Other courts have found similar payment requirements constitutional under bill of attainder clause analysis. See *Kerr-McGee,* 837 F.Supp at 936 (statute requiring payment into safety fund for future clean-up costs in absence of an agreement with the government found non-punitive and thus not a bill of attainder). Plaintiffs allege that the "punishment" inflicted under the Qualifying Statute is the requirement that NPMs "deposit huge sums of money into an escrow fund in the same amount Cods pay for past liability." Such payments are based on the amount of plaintiffs' sales. As such, they are legitimately targeted to nonpunitive purposes, notwithstanding plaintiffs' characterization of the payment amount.

"The final test examines the legislative history of the statute in question. Plaintiffs do not – nor could they – allege that the legislative history of the Qualifying Statute indicates any impermissible intent to punish.

"Because the FAC has not sufficiently alleged that the Qualifying Statute contains the requisite specificity for a bill of attainder claim, and cannot allege that the statute is impermissibly punitive under any of the tests routinely employed by the courts, plaintiffs' bill of attainder claim is dismissed."

Another case which is applicable to the issue of bill of attainder is *Selective Service System v. Minnesota Public*

Interest Research, 468 U.S. 841, 104 S.Ct. 3348 (1984). It stated at page 7 as follows:

"In determining whether a statute inflicts punishment within the proscription against bills of attainder, our holdings recognize that the severity of a sanction is not determinative of its character as punishment. *Flemming v. Nestor,* 363 U.S. 603, 616, and n. 9, 80 S.Ct. 1367, 1375, and n. 9, 4 L.Ed. 2d 1435 (1960). That burdens are placed on citizens by federal authority does not make those burdens punishment. *Nixon v. Administrator of General Services,* 433 U.S., at 470, 97 S.Ct. at 2804; *United States v, Lovett,* 328 U.S., at 324, 66 S.Ct., at 1083 (Frankfurter, J., concurring). Conversely, legislative intent to encourage compliance with the law does not establish that a statute is merely past events, but may involve the legitimate regulation of conduct. Punishment is not limited solely to retribution for deprivations inflicted to deter future misconduct. *United States v. Brown,* 381 U.S., at 458-459, 85 S.Ct. at 1720-1721. It is thus apparent that, though the governing criteria for an attainder may be readily indicated, "each case has turned on its own highly particularized context." *Flemming v. Nestor,* supra, 363 U.S., at 616, 80 S.Ct., at 1375.

> FN8 "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation." 328 U.S., at 324, 66 S.Ct., at 1083.

In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the

historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." *Nixon,* supra, 433 U.S. at 473, 475-476, 478, 97 S.Ct., at 2805, 2806-2807, 2808. We conclude that under these criteria 12(f) is not a punitive bill of attainder"

Lastly on the issue of a Bill of Attainder, one must look at *Nixon v. Administrator of General Services* where at pages 475-76 it's stated:

"But our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. *Cummings v. Missouri,* 4 Wall., at-319-320; *Hawker v. New York,* 170 U.S. 189, 193-94 (1898); *Dent v. West Virginia,* 129 U.S. 114, 128 (1889); *Trop v. Dulles,* 356 U.S. 86, 96-97 (1958) (plurality opinion); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."

Conversely, if there is a legitimate legislative purpose, i.e., to have revenue to protect the public health of the citizens of its state, then there is a legitimate justification for the passage of the law, as there is in our case.

The *Nixon* case also stated that you could look at alternatives to the burden imposed, which the legislature did in our case. The legislature granted an alternative in which they could join the Majors and pay the fee based upon what the Majors are paying. However, that alternative would even be more burdensome because it would be 48 cents a pack versus 35 cents a pack, but it is a choice. Plaintiff could choose to be treated the same as the Majors (48 cents) or pay the fee for NPN (35 cents).

Federal Communications Commission v. Beach Communications., Inc. stated:

"Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. See *Sullivan v. Stroop,* 496 U.S. 478, 485, 110 S.Ct. 2499, 2504, 110 L.Ed. 2d 438 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603, 107 S.Ct. 3008, 3016-3018, 97 L.Ed. 2d 485 (1987); *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 174-179, 101 S.Ct. 453, 459-462, 66 L.Ed. 2d 368 (1980); *Dandridge v. Williams*, 397 U.S. 471, 484-485, 90 S.Ct. 1153, 1161, 25 L.Ed. 2d 491 (1970). Where there are "plausible reasons" for Congress's action, "our Inquiry is at an end." *United*

States Railroad Retirement Bd. v. Fritz, supra, 449 U.S., at 179, 101 S.Ct. at 461. This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed. 2d 171 (1979) (footnote omitted). [FN6]"

The last argument which the plaintiffs have raised in this case is that this statute does not have the presumption of constitutionality; however, that was also dealt with by the Supreme Court of the United States in *W.J. Usury, Jr. v. Turner Elkhorn Mining Company,* 428 U.S. 1, 96 S.Ct. 2882 (1976) wherein it is stated:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *E.g., Ferguson v. Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed. 2d 93 (1963); *Williamson v. Lee optical Co.*, 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955). And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee. *New York Central R. Co. v. White,* 243 U.S. 188, 37

S.Ct. 247, 61 L.Ed. 667 (1917); see also *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911 (1912).

ANALYSIS

It is clear from the cases cited above that there is a presumption of constitutionality in the acts by the legislature and the plaintiff here must overcome that presumption. Such presumption is not overcome because it is also clear in the statute itself that the purposes for the legislation were certainly within the purview of the legislature and are for the legitimate public purpose of dissuading youth from smoking.

The other legitimate legislative purposes that could be had is to offset increased health care costs associated with smokers, as was the stated purpose and for which certain parts of the proceeds from the settlement with the Majors is being used for in Minnesota. The other use, of course, in the settlement is to advertise and dissuade smoking, similar to the stated purpose in the legislation act (MSA 297F.24) before this Court.

Plaintiffs argue that it violates the Due Process Clause because they are not entitled to a hearing in court and there is no alternative but to comply with paying a fee or to pay even more money (48 cents per pack) by joining in and contributing the same as the Majors. They have had their day in court. They have been allowed to argue their points clearly. Even though they allege they were not accused of wrongdoing, it is clear to this Court that by selling cigarettes at a substantially reduced price than the Majors, they are, in fact, contributing to underage smoking. The legislation has an absolute right and duty to do

everything with the Constitution to discourage illegal smoking and to discourage people from voluntarily increasing the cost of health care for the population in general. It is not for this Court.

Likewise, the plaintiffs' argument regarding a violation of the Equal Protection Clause, the above cases clearly point out that this is not a selective classification, but rather legislation which permits this class of plaintiffs to join with the other manufacturers (Majors) in participating in the terms of the settlement agreement. The alternative to not participating with the Majors and being considered in the same class as the Majors is to pay a reduced fee (35 cents a pack) by complying with the legislation. The plaintiffs' argument that they have been denied equal protection of the laws in violation of their constitutional rights is without merit.

Lastly, the plaintiffs' argument that this is a Bill of Attainder is also without merit. This is not punishment for producing a lawful product, but rather a fee charged for legitimate legislative public purposes for being allowed to sell their products within the state of Minnesota. They can avoid paying the fee simply by not selling cigarettes within the state of Minnesota. This is no different than fees that are charged by the government for all kinds of legitimate businesses that wish to do business within the state of Minnesota. An additional sales tax is charged for the sale of liquor in the state of Minnesota. Liquor is also a legal product, like cigarettes, but they pay more than the general sales tax paid by sellers of other legal products. And certainly, the State and its governmental subdivisions impose all sorts of license fees if you purport to do business within their governmental jurisdictions. The plaintiffs' arguments regarding Bill of Attainder fail.

CONCLUSIONS

Based upon the above, plaintiffs have failed to meet their burden of showing that the law is unconstitutional because it does not deny them due process of law, equal protection under the law, does not infringe upon their rights of free speech, and lastly is not a Bill of Attainder. And for these reasons, the plaintiffs' motion for summary judgment is **DENIED** and the defendants' motion for summary judgment must be **GRANTED** and the plaintiffs' cause of action is hereby **DISMISSED**.

STATE OF MINNESOTA

IN SUPREME COURT

A03-2020

Council of Independent Tobacco Manufacturers of America, et al.,

Appellants,

vs.

The State of Minnesota, et al.,

Respondents.

ORDER

(Filed May 16, 2006)

Based upon the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of the Council of Independent Tobacco Manufacturers of America, et al., for rehearing be, and the same is, denied.

IT IS FURTHER ORDERED that the paragraph that begins on page 11 and ends on page 12 of the slip opinion filed on March 16, 2006, is hereby modified to read as follows:

> Our conclusion comports with the result reached by a federal district court that addressed a First Amendment challenge to the national tobacco settlement. *S & M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604 (M.D. Tenn. 2005). Under the national tobacco settlement, as a condition of receiving full settlement payments, participating states are required to enact "Qualifying Statutes" that obligate each tobacco product manufacturer to either become a "participating

manufacturer" (as defined in the national tobacco settlement agreement) or make payments to an escrow fund. Those manufacturers that elect to become "participating manufacturers" make payments to the state and voluntarily agree to the same restrictions on advertising, lobbying, and product placement as the original signatories to the settlement. Those manufacturers that choose not to become "participating manufacturers" pay a fee that for the years 2003 through 2006 is $.0167539 per cigarette sold in the state, and for the years 2007 and thereafter is $.0188482 per cigarette sold. In *S & M Brands*, the federal district court upheld the escrow requirement on the same grounds we employ here: the escrow payments required under the national tobacco settlement are no greater than the amounts the manufacturer would be obligated to pay by participating in the settlement.

> Thus, the focus of the unconstitutional conditions doctrine is on whether a governmental entity is denying a benefit to Plaintiffs that they could obtain by giving up their freedom of speech, or is penalizing them for refusing to give up their First Amendment rights. The Court finds that no such conditions are imposed upon Plaintiffs under Tennessee's legislative scheme. The Escrow Act, as amended by the ASR Amendment, leaves Plaintiffs no worse off financially than they would be under the [Master Settlement Agreement], because it expressly provides that Plaintiffs are entitled to a refund on any amounts paid into escrow that they can demonstrate is in excess of the amount

> they would have paid under the [Master Settlement Agreement]. Further, Plaintiffs retain all of the First Amendment and other rights that the [participating manufacturers] gave up when they signed the [Master Settlement Agreement]. Because Defendant is neither denying a benefit to Plaintiffs that they could obtain by giving up their freedom of speech nor punishing Plaintiffs for refusing to give up their free speech rights, the unconstitutional conditions doctrine does not apply.

Id. at 637-38 (citations omitted). Said paragraph previously read as follows:

> Our conclusion comports with the results reached by other courts that have addressed First Amendment challenges to the national tobacco settlement. Under the national tobacco settlement, as a condition of receiving full settlement payments, participating states are required to enact "Qualifying Statutes" that obligate each tobacco product manufacturer to either become a "participating manufacturer" (as defined in the national tobacco settlement agreement) or make payments to an escrow fund. Those manufacturers that elect to become "participating manufacturers" make payments to the state and voluntarily agree to the same restrictions on advertising, lobbying, and product placement as the original signatories to the settlement. Those manufacturers that choose not to become "participating manufacturers" pay a fee that for the years 2003 through 2006 is $.0167539 per cigarette sold in the state and for the years 2007 and thereafter is $.0188482 per

cigarette sold. Courts that have examined the First Amendment impact of these provisions have upheld them. *Xcaliber Int'l Ltd., LLC v. Ieyaub*, 377 F. Supp. 2d 567 (E.D. La. 2005); *S & M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604 (M.D. Tenn. 2005). In particular, in *Xcaliber* the federal district court upheld the escrow requirement on the same grounds we employ here: the escrow payments required under the national tobacco settlement are no greater than the amounts the manufacturer would be obligated to pay by participating in the settlement.

> The focus of the unconstitutional conditions doctrine is on whether Louisiana is denying a benefit to plaintiffs that they could obtain by giving up their freedom of speech, or is penalizing plaintiffs for refusing to give up their First Amendment rights. The court finds the amended escrow statute leaves plaintiffs no worse off financially than they would be under the Agreement, and plaintiffs retain all of the First Amendment and other rights that the participating manufacturers relinquished by signing the Agreement. Because defendant is neither denying a benefit to plaintiffs that they could obtain by giving up their freedom of speech, nor is it punishing plaintiffs for refusing to give up their free speech rights, the unconstitutional conditions doctrine does not apply.

Xcaliber, 377 F. Supp. 2d at 573; *accord, S & M Brands, Inc. v. Summers*, 393 F. Supp. 2d at 637-38 (concluding that the First Amendment did not bar the requiring of payments to state's escrow

account because the requirement leaves plaintiffs no worse off financially than they would be under the Master Settlement Agreement).

Dated: May 16, 2006

BY THE COURT:

/s/ Alan C. Page
Alan C. Page
Associate Justice

ANDERSON, Russell A., C.J., and GILDEA, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA

Council of Independent Tobacco Manufacturers of America, et al., Appellants, vs. The State of Minnesota, et al., Respondents

JUDGMENT

Supreme Court

Appellate Court
A03-2020

Trial Court
C1-03-7120

Pursuant to a decision of Supreme Court duly made and entered it is determined and adjudged that the decision of the Ramsey County District Court, Civil Division herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: June 15, 2006

FOR THE COURT

Attest: Frederick K. Grittner
Clerk of the Appellate Court

By: /s/ [Illegible]
Assistant Clerk

STATE OF MINNESOTA

SUPREME COURT

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled as appears from the original record in my office; that I have

carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul *June 15, 2006*
Dated

Frederick K. Grittner
Clerk of the Appellate Courts

By: /s/ [Illegible]
Assistant Clerk

(2)

No. 06-371

Supreme Court, U.S.
FILED
OCT 16 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA,

Petitioner,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MIKE HATCH
Minnesota Attorney General
BRADFORD S. DELAPENA
Assistant Attorney General
RITA COYLE DEMEULES
(*Counsel of Record*)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 296-0692

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Minnesota Cigarette Fee Act imposes a 35-cent per-pack fee upon the sale in Minnesota of "nonsettlement cigarettes," which are cigarettes manufactured by a person other than a manufacturer that has entered into a settlement agreement with the State of Minnesota. Cigarette manufacturers who choose to enter into such agreements either make annual payments to the State, or pay a higher fee than required by the Act, namely, 48 cents per pack. In addition, settling manufacturers that pay higher fees agree to abide by certain advertising and lobbying restrictions. Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") filed suit in Minnesota state court alleging that because the Cigarette Fee Act imposed a tax on those manufacturers that did not seek a settlement agreement that includes those restrictions, it abridged free speech protections, violated equal protection and due process guarantees, and was a bill of attainder. The Minnesota Supreme Court upheld the lower court's ruling dismissing all of CITMA's claims. CITMA petitions this Court only with respect to its First Amendment claim. The question presented is whether a statute that imposes a lower per-pack fee where the cigarette manufacturer chooses to retain advertising and lobbying rights; and a higher per-pack fee where those rights are voluntarily waived, unconstitutionally denies a benefit to Petitioner based on the exercise of its First Amendment rights.

TABLE OF CONTENTS

Page

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 7

I. THE MINNESOTA SUPREME COURT PROPERLY UPHELD THE CONSTITUTIONALITY OF THE CIGARETTE FEE ACT BECAUSE THAT ACT HAS NO SPEECH SUPPRESSION PURPOSE AND NO ECONOMIC COERCION 8

II. THE MINNESOTA SUPREME COURT PROPERLY CONSIDERED THE ECONOMIC EFFECT OF THE ACT AND THEN, CONSISTENT WITH THIS COURT'S FIRST AMENDMENT PRECEDENTS, UPHELD THE CONSTITUTIONALITY OF THAT ACT 14

III. THIS COURT DOES NOT EXERCISE ITS DISCRETIONARY JURISDICTION BASED ON SPECULATIVE ASSUMPTIONS ABOUT POSSIBLE FUTURE SETTLEMENTS OR LAWS THAT ARE NOT BEFORE THE COURT 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002) 4

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 9, 10

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) 12

Fed. Communications Comm'n v. League of Women Voters of California, 468 U.S. 364 (1984) 9, 11

Follett v. Town of McCormick, 321 U.S. 573 (1944) 17

Jimmy Swaggert Ministries v. Board of Equalization of California, 493 U.S. 378 (1990) 18

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 12

Mariana v. Fisher, 226 F. Supp. 2d 575 (M.D. Pa. 2002), *aff'd*, 338 F.3d 189 (3d Cir. 2003) *cert. denied sub nom. Mariana v. Pappert*, 540 U.S. 1179 (2004) 4

Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 14, 15

PTI, Inc. v. Philip Morris, Inc., 100 F. Supp. 2d 1179 (C.D. Cal. 2000) 4

Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983) 10, 11

Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 12

S&M Brands, Inc. v. Summers, 393 F. Supp. 2d 604 (M.D. Tenn. 2005) 16

TABLE OF AUTHORITIES – Continued

Page

Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105 (1991)..... 9, 10

Speiser v. Randall, 357 U.S. 513 (1958)..... 8, 9, 11, 16, 17

Star Scientific, Inc. v. Beales, 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002)..... 4, 16

Stromberg v. California, 283 U.S. 359 (1931)..... 8

Thompson v. Western States Med. Ctr., 535 U.S. 357 (2002)..... 12

United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75 (1947)..... 20

STATUTES

Minn. Stat. § 297F.24 (2004)..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. I..... *passim*

U.S. CONST., amend. XIV..... 8

OTHER AUTHORITIES

Act of May 25, 2003, ch. 127, art. 14, § 9, 2003 Minn. Laws 946-47..... 5

Office of Smoking & Health, U.S. Department of Health & Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* 19, 337, 359 (2000)..... 19

4 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 20.11 (3d ed. 1999)..... 14

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents State of Minnesota and Dan Salomone in his capacity as Commissioner of the Minnesota Department of Revenue respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion and judgment in this case. The Minnesota Supreme Court's Opinion is published at 713 N.W.2d 300 (Minn. 2006), and is reproduced in CITMA's Appendix ("Pet. App.") at Pet. App. 1-32. The opinion of the Minnesota Court of Appeals is published at 685 N.W.2d 467 (Minn. Ct. App. 2004) and is reproduced at Pet. App. 33-47. The trial court's Summary Judgment Order, which is unpublished, is reproduced at Pet. App. 48-71.

STATEMENT OF THE CASE

The Minnesota Legislature enacted the Cigarette Fee Act, Minn. Stat. § 297F.24 (2004) ("the Act"), to address the radical market changes that followed the 1998 settlement of Minnesota's landmark lawsuit ("State Tobacco Lawsuit") against the country's four largest cigarette manufacturers, Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. ("the Major Manufacturers").[1] Thus, the State's settlement with the Major Manufacturers, the market changes that followed that settlement, and the solutions

[1] The State had settled its claims against cigarette manufacturer, Liggett Group, Inc., on March 20, 1997, with an agreement that imposed monetary and non-monetary terms, including restrictions on Liggett's advertising practices. Pet. App. at 3-5.

that Minnesota and other states used to address those market changes are the backdrop against which CITMA brought its First Amendment challenge to the Act.[2]

Minnesota settled its case against the Major Manufacturers in May 1998 ("the Minnesota Agreement"). Under the terms of the settlement, the Major Manufacturers were required, among other things: (a) to make six one-time settlement payments to the State; (b) to make additional annual payments to the State in perpetuity; and (c) to significantly restrict their lobbying and advertising activities. Pet. App. at 3-4. In exchange, the State released the Major Manufacturers from all past and future tobacco-related claims, including future legal claims for reimbursement for health care costs allegedly associated with the use of or exposure to tobacco products. Pet. App. at 36.

Minnesota's settlement was followed, approximately six months later, by a Master Settlement Agreement, entered into between the Attorneys General of 46 other states, settling similar state suits to recover health care costs associated with treating smoking-related illnesses ("MSA"). Similar to Minnesota's agreement with the major manufacturers, the MSA required the Major Manufacturers to: (a) make five one-time payments; (b) to make annual payments in perpetuity; and (c) to substantially restrict their advertising and lobbying activities. Pet. App.

---

[2] This case was heard in the trial court and on appeal based on stipulated facts. Pet. App. at 6, 50. Factual statements and claims that CITMA makes in this Petition that are not based on those facts are therefore outside the record of this case. For example, CITMA's claim that the Act has "no effect on competitors' cigarettes which are exempt from the Tax," Pet. Br. at 5, is inconsistent with the stipulated fact that manufacturers who have entered into the agreements described in the Act pay a *higher* fee than that imposed by the Act. *See* Pet. App. at 37.

at 36. In exchange, the settling states released the Major Manufacturers from a wide range of legal claims, including monetary claims related to the public health-related costs of smoking. Pet. App. at 25-26.

At the time Minnesota entered into its agreements with Liggett and the Major Manufacturers, those manufacturers represented more than 98 percent of the state cigarette market. Pet. App. at 4. By 2003, however, the collective Minnesota market share of nonsettling manufacturers had increased from 2 percent to 12 percent. Pet. App. at 5. These manufacturers, which were not making annual payments to the State and, therefore, had not increased their prices, had been able to offer their cigarettes at prices substantially lower than the Major Manufacturers. Pet. App. at 4, 37, 50-51, 69.

The capture of significant market share by nonsettling manufacturers caused two problems for Minnesota. First, the lower price of non-settlement cigarettes increased the probable incidence of youth smoking, thereby undermining the State's effort to curb smoking in that population. Pet. App. at 4-5. Second, the nonsettling manufacturers' increased market share, with the resulting increased availability of lower-priced cigarettes that did not include the State's health care costs, allowed a significant percentage of smokers to once again shift to the State the health-related costs of their smoking. Pet. App. at 4, 37, 51.

The MSA States had anticipated some of these marketplace responses, and therefore included a model "Qualifying Statute" for each participating state to pass to address this problem. Pet. App. at 9-10. The Qualifying Statute was intended: (1) to encourage manufacturers to join the MSA as "subsequently participating manufacturers" ("SPMs"),

and thus to compensate the MSA states for the health care costs of their products; and (2) to remove the competitive disadvantage that settling manufacturers would face in competing against nonsettling manufacturers ("NPMs"). Pet. App. at 9, 36. The MSA also included strong incentives for member states to enact and enforce a Qualifying Statute, by potentially reducing the State's annual payments based on the increased market share of NPMs if such a statute was not enacted. Pet. App. at 12. Under the enacted Qualifying Statutes, the NPMs who did not participate in the MSA are required to make payments into an escrow fund based on the number of cigarettes the NPM sells in a state. Pet. App. at 10. The NPM retains ownership of the escrow fund and of the interest that accrues over the 25-year period the payments must remain in escrow. *Id.* If a state successfully sues an NPM for health care costs, the Qualifying Statute ensures that the state will have a fund from which to collect. *Id.*[3]

Minnesota chose to use the Cigarette Fee Act to achieve a goal similar to that of the MSA states, to prevent non-settling manufacturers such as CITMA's members

[3] By 2003, federal courts had sustained the MSA and its related provisions against numerous challenges, including claims based upon: (1) the Sherman and Clayton Acts; (2) the First Amendment; (3) the Equal Protection Clause of the Fourteenth Amendment; (4) the Due Process Clause of the Fourteenth Amendment; (5) the Commerce Clause; (6) the Compact Clause; (7) the Import/Export Clause; and (8) the constitutional prohibition against bills of attainder. *See, e.g., Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002); *Mariana v. Fisher*, 226 F. Supp. 2d 575 (M.D. Pa. 2002), *aff'd*, 338 F.3d 189 (3d Cir. 2003), *and cert. denied sub nom. Mariana v. Pappert*, 540 U.S. 1179 (2004); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000).

from exploiting the competitive advantage they derived from the circumstances created by the State's settlements. Pet. App. at 5. On May 25, 2003, Governor Pawlenty signed legislation enacting Minn. Stat. § 297F.24. *See* Act of May 25, 2003, ch. 127, art. 14, § 9, 2003 Minn. Laws 946-47. The Act imposes a 35-cent per-pack fee upon the sale of "nonsettlement cigarettes." *See* Minn. Stat. § 297F.24, subd. 1(a). The statutory term "nonsettlement cigarette" means a cigarette manufactured by a person other than a manufacturer: (a) that "is making annual payments to the state of Minnesota under a settlement of" the State Tobacco Lawsuit; or (b) that "has voluntarily entered into an agreement with the state of Minnesota . . . agreeing to terms similar to those contained in [the Minnesota Agreement] including making annual payments to the state . . . equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the [Minnesota Agreement]." Minn. Stat. § 297F.24, subd. 2(1)-(2).

The Act has three stated purposes: (1) to "ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;" (2) to "prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers;" and (3) to "fund such other purposes as the legislature determines appropriate." Minn. Stat. § 297F.24, subd. 1(b).

The Act requires the Commissioner of Revenue to administer the fee "in the same manner as the [cigarette] excise tax imposed under section 297F.05." Minn. Stat. § 297F.24, subd. 3. Accordingly, the fee is imposed upon

cigarette distributors rather than manufacturers, who pass along its cost to their customers, and so on down the distribution chain to the retail level. Pet. App. at 37. A cigarette manufacturer that has not previously done so may enter into an agreement with the State. Minn. Stat. § 297F.24, subd. 2(2). Since the Commissioner of Revenue is authorized to administer the Act, he made two important determinations concerning its proper implementation with respect to further agreements with the State. First, the Act's requirement that new agreements must include "terms similar to those contained" in the Minnesota Agreement means that new agreements must include: (a) similar advertising and lobbying restrictions; and (b) similar release provisions. Pet. App. at 37. Second, the requirement that new agreements must involve annual payments equal to at least 75 percent of the payments made by one of the four original manufacturers under the Minnesota Agreement mandated payments as of September 2003 of at least 48 cents per pack of cigarettes sold in Minnesota. Pet. App. at 37.

On June 26, 2003, CITMA filed its action in Ramsey County District Court and moved for a temporary restraining order to prohibit the Commissioner of Revenue from implementing the Act on its July 1, 2003 effective date. Pet. App. at 38. CITMA alleged that the Act abridged free speech, violated equal protection and due process guarantees, and was a bill of attainder. The trial court denied CITMA's request for injunctive relief. Pet. App. at 38.

Thereafter, CITMA and the State entered into a Stipulation of Facts and brought cross-motions for summary judgment. Pet. App. at 6. On November 19, 2003, the trial court upheld the Act in all respects and granted the State's motion for summary judgment. Pet. App. at 48-71.

On August 24, 2004, the Court of Appeals issued its decision affirming the district court. Pet. App. at 33-47. On March 16, 2006, the Minnesota Supreme Court issued an Order upholding the Court of Appeals' decision, and rejecting all of CITMA's claims, including the First Amendment claim raised by this Petition. Pet. App. at 1-32. Finally, on May 16, 2006, the Minnesota Supreme Court denied CITMA's Petition for Rehearing in an Order that modified one paragraph in its March 16 Opinion. *See* Pet. App. at 72-76.

REASONS FOR DENYING THE PETITION

The Petition does not present a proper occasion for this Court to undertake consideration of CITMA's First Amendment claim. The Minnesota Supreme Court correctly understood and applied this Court's unconstitutional conditions doctrine because it recognized that the Act has none of the necessary elements of that claim: it is not aimed at the suppression of speech, it does not reference speech, and it does not offer manufacturers a benefit in a manner calculated to coerce the surrender of speech.

Second, the decision of the Minnesota Supreme Court does not conflict with the decision of any other state court or federal appellate court. Indeed, every court that has considered First Amendment challenges to statutes that impose costs similar in purpose and intent to the Minnesota Fee Act has rejected those challenges. Further, the allegedly conflicting cases CITMA cites are fundamentally different from this case.

Third, the notion that the Minnesota Supreme Court's opinion in this case will impact potential future

settlements in unrelated cases is not the type of compelling reason that justifies this Court's exercise of discretionary jurisdiction. This Court, like all courts, does not issue advisory opinions. Speculation about *potential* future events does not substitute for actual, justiciable controversies.

I. The Minnesota Supreme Court Properly Upheld The Constitutionality Of The Cigarette Fee Act Because That Act Has No Speech Suppression Purpose And No Economic Coercion.

The Minnesota Supreme Court correctly concluded that the Act does not abridge CITMA's free speech rights under the First Amendment to the United States Constitution.[4] More specifically, the court correctly ruled that the Act does not involve an unconstitutional condition that coerces the surrender of free speech rights. Because the Act pursues legitimate public health goals, is not directed at speech, and does not coerce the surrender of free speech rights, there is no basis for a Writ of Certiorari here.

CITMA properly notes that the government may not condition a tax exemption on the renunciation of free speech rights. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958). However, the unconstitutional conditions doctrine is applied only where a law has as its purpose the suppression of speech, is expressly directed at speech, and the

---

[4] The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I. These prohibitions have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931).

suppression is achieved through economic coercion. *See id.* at 527-29; *Fed. Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364, 381-84 (1984). None of those conditions are present here.

CITMA's Petition fails at the outset because it does not challenge the legitimacy or validity of the express purposes for the Act. CITMA urges the Court to ignore the purpose of Minnesota's Act, arguing that the *Speiser* rule applies "no matter what the purpose or intent of the government is in enacting a tax law or providing a subsidy." Pet. Br. at 16. This is wrong. Even the *Speiser* Court began with the purpose of the challenged California legislation, by contrasting it with permissible legislative purposes: "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, *some interest clearly within the sphere of governmental concern*." *Speiser,* 357 U.S. at 527 (citing cases, emphasis added).

The Act's purposes, to discourage youth smoking and to equalize cigarette prices by ensuring that all manufacturers bear some measure of the health costs related to smoking, are clearly within the "sphere of governmental concern." CITMA did not challenge these purposes below, or the State's authority to impose fees to fund these purposes. CITMA's only argument is that these purposes should be ignored. But the cases that CITMA cites to support this argument, even though brought under the First Amendment, are fundamentally different from the claim that CITMA pressed below. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 222 (1987). These cases involved facially discriminatory, content-based speech restrictions.

See Simon & Schuster, Inc., 502 U.S. at 116 (noting that challenged law "singles out" only expressive activity and is "directed only at works with a specific content"); *Arkansas Writers' Project, Inc.*, 481 U.S. at 229 (noting that Arkansas tax "is not evenly applied to all magazines" and tax status depends entirely on content). This form of discrimination is, the Court noted, "particularly repugnant to First Amendment principles." *Arkansas Writers' Project, Inc.*, 481 U.S. at 229. And, it was because "selective taxation of the press . . . poses a particular danger of abuse by the State," *id.* at 228, that the Court declined to consider any censorial motive in those cases. *Id.* (*cited in Simon & Schuster*, 502 U.S. at 509).

The distinction between the unconstitutional conditions doctrine, and the facially discriminatory, content-based restrictions on the press that were at issue in *Simon & Schuster* and *Arkansas Writers' Project*, is a critical one that CITMA ignores. But it cannot be so easily dismissed because this Court has held that the government's "power to encourage actions deemed to be in the public interest is necessarily far broader where suppression of dangerous ideas is not the purpose." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983) (applying unconstitutional conditions doctrine). The heightened scrutiny afforded to the discriminatory, content-based restrictions at issue in *Simon & Schuster* and *Arkansas Writers' Project, Inc.* is simply not applicable here because the Act is not facially discriminatory, there are no restrictions on the press, and absolutely nothing in the Act explicitly references speech, let alone content-based restrictions.

Even if the Court did not consider the legitimate purposes supporting the Act, CITMA's unconstitutional

conditions challenge fails for a second, separate reason: there is neither a speech restriction to the Act, nor an economic coercion element. The Minnesota Supreme Court correctly concluded that this void justified dismissal of CITMA's claim. *See* Pet. App. at 11; *cf. also Regan*, 461 U.S. at 545 (noting that appellant was "certainly incorrect when it claims that this case fits the *Speiser-Perry* model," and that challenged legislation did not deny a benefit based on exercise of First Amendment rights).

CITMA's claim does not fit the *Speiser-Perry* model. *Speiser* involved a California statute that annually required veterans seeking a property tax exemption to sign a loyalty oath declaring that they had not engaged in subversive speech. 357 U.S. at 515. The statute was "frankly aimed at the suppression of dangerous ideas." *Id.* at 519. If the veteran did not sign the oath, the property tax exemption was denied. *Id.* Through this effect, the State essentially purchased, or coerced, the surrender of speech rights: "[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.*

The same two conditions rendered unconstitutional the statute at issue in *Fed. Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364 (1984). Here, the challenged statute provided that, "[n]o noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting . . . may engage in editorializing." *Id.* at 366, 371 n.7. This measure, the Court found, was "specifically directed at a form of speech – namely, the expression of editorial opinion – that lies at the heart of First Amendment protection." *Id.* at 381. The economic coercion element rested in

the availability of government grants only where broadcasters refrained from "editorializing." *Id.* at 370-71.[5]

The Act has neither of these elements, and the Minnesota Supreme Court therefore properly upheld its constitutionality. First, the Act does not even reference speech. Rather, it makes a product-based distinction, not a speaker or content distinction, that identifies those cigarettes sold in Minnesota that do not reflect health care cost internalization, versus those that do. *See* Pet. App. at 4-5, 41. The statutory distinction has nothing to do with which manufacturer has waived or not waived its First Amendment rights, as CITMA contends. Pet. Br. at 14.

---

[5] Neither of the two decisions that CITMA cites in support of its claim, *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002), actually involved the application of this doctrine. Rather, *Rosenberger* involved viewpoint or content-based speech restrictions in the limited forum setting, as articulated in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). *See* 515 U.S. at 829-30 (reviewing principles that govern State's use of speech restrictions in a limited forum of the State's own creation). *Thompson* involved the proper application of this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) to admittedly lawful and truthful commercial speech. *See* 535 U.S. at 367 (noting relevance of proper application of *Central Hudson* and that government concedes speech at issue is neither misleading nor concerning unlawful activity). Even if these decisions are relevant to an unconstitutional conditions claim, both rested, at least in part, on a regulation directed at speech with economic coercion used to achieve the government's aim of restricting that speech. *See Rosenberger*, 515 U.S. at 834-36 (noting that regulation had a "speech-based restriction as its sole rationale and operative principle" and that denial of payments based on that regulation effects a "sweeping restriction" on speech); *Thompson*, 535 U.S. at 371, 376 (noting that government used FDA approval authority over compounded drugs to regulate speech, thus controlling large-scale marketing of those drugs, but unnecessarily excluding "beneficial speech").

Second, the Act does not offer manufacturers a government benefit in a manner calculated to coerce the surrender of free speech rights. Under the Act, a nonsettling manufacturer has two options: (1) it can refrain from seeking an agreement, allow the State to collect the 35-cent per-pack fee from cigarette distributors, and fully exercise its First Amendment rights; or (2) it can enter an agreement, make higher per-pack payments to the State, and voluntarily curtail certain advertising and lobbying activities.

The mere statement of these alternatives shows that the Act does not financially coerce manufacturers *to enter* agreements involving speech waivers. CITMA argues that the Act is unconstitutional because it can avoid the fee only by surrendering speech rights. Pet. Br. at 14. CITMA ignores, and prefers this Court to ignore, the fact that the decision to enter into an agreement with the State and waive certain speech rights imposes a more onerous financial requirement. The financial incentive, in other words, tends to *discourage* rather than to coerce new agreements. CITMA cites no decision in which a surrender of First Amendment rights was struck down as an unconstitutional condition where those rights were voluntarily waived by choosing the more expensive option. Nor does CITMA explain how the higher per-pack fee is a "benefit," when it costs less to retain its advertising and lobbying rights. Had Minnesota really intended to coerce the waiver of free speech rights, as CITMA alleges, it surely would not have made entering agreements the *costlier* option.

More importantly, CITMA's refusal to acknowledge these critical aspects of the Act demonstrates that CITMA's Petition should be denied.

II. The Minnesota Supreme Court Properly Considered The Economic Effect Of The Act And Then, Consistent With This Court's First Amendment Precedents, Upheld The Constitutionality Of That Act.

CITMA urges the Court to ignore a critical financial fact: that it costs more to enter into an agreement than to pay the fee. Citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), CITMA asserts that this fact should have been deemed irrelevant to the Minnesota Supreme Court's consideration of CITMA's unconstitutional conditions challenge. *See* Pet. Br. at 19. This is incorrect. CITMA's attacks on the Minnesota Supreme Court's consideration of the economic realities of cigarette pricing do not undermine that court's careful and accurate analysis of the First Amendment issue.

CITMA's argument fails first because a court cannot consider an unconstitutional conditions challenge without considering the options posed. Indeed, application of that doctrine *requires* the careful weighing of two alternatives. *See* 4 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 20.11, at 285 (3d ed. 1999) ("Courts must in each instance examine the substance of the condition to determine whether it violates constitutional principles."). If the Court cannot consider the financial consequences of both waiving and retaining a right, then it cannot ascertain whether the State is attempting to coerce a waiver by making waiver the more financially desirable alternative (as in *Speiser*). CITMA cannot invoke a weighing doctrine, but then ask the Court to ignore facts essential to proper weighing.

Second, *Minneapolis Star & Tribune* is entirely distinguishable. The challenged statute in that case

imposed a use tax on ink and paper used to produce publications, and thus plainly implicated speech. *Star & Tribune*, 460 U.S. at 577-78 & n.2. The State argued, *inter alia*, that the challenged measure actually *favored* publishers because a use tax on raw materials is less onerous than a sales tax on (higher-priced) final products. *Id.* The Court, however, declined the State's invitation to engage in an analysis of "the relative burdens of various *methods of taxation*." *Id.* at 589-90 & nn.12-14 (emphasis added).

CITMA's unconstitutional condition claim does not require this Court to evaluate "the relative burdens of various methods of taxation." *Star & Tribune*, 460 U.S. at 589.[6] Instead, it raises the very different question of whether the Act coerces manufacturers to enter settlement agreements. Consideration of the higher per-pack payments required by such agreements is essential to resolution of this issue, and demonstrates that the Act does not involve an unconstitutional condition. So long as manufacturers are truly free to decide – to choose between the Act's *offer* of settlement on terms acceptable to the State, or no settlement – there is no constitutional violation. The Act presents manufacturers with an entirely voluntary

---

[6] The *Minneapolis Star & Tribune* case is also distinguishable because it obviously involves restrictions on the press, a fact the Court repeated throughout the portions that CITMA quotes. Thus, the Court was reluctant to consider the relative economic burdens because "the very selection of *the press* for special treatment threatens *the press* not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment." 460 U.S. at 588 (emphasis added). Similarly, the Court noted that it was "an extra burden on *the press*" that could allow censorial effects. *Id.* (emphasis added). CITMA's alterations to the quoted language, to substitute "taxpayer" or "entities" improperly minimizes the Court's focus on the press in this case.

business decision that turns upon each manufacturer's evaluation of the State's offer. If a manufacturer concludes that obtaining a release of legal claims is desirable or prudent, it can enter into an agreement undertaking a higher per-pack payment and waiving certain First Amendment rights. If a manufacturer does not wish to obtain a release, it can refuse to enter into an agreement, allow the State to collect the lower, 35-cent fee from distributors, and continue exercising all of its First Amendment rights.[7]

It was within this framework that the Minnesota Supreme Court concluded that the Act does not *coerce* settlement. Ignoring this framework, as CITMA urges, would require this Court to ignore the entire background and foundation for the Act. But this framework *is* relevant and confirms that the Act cannot be an unconstitutional condition where there is no coercive element.

Next, CITMA argues that "it is impossible to determine which of these choices has the greater inherent value or economic benefit for cigarette manufacturers." Pet. Br. at 21. But the question for the Court is not the "inherent value" of any choices, but simply whether a *burden* is imposed for exercising First Amendment rights. *See Speiser*, 357 U.S. at 529 (taxpayer could not be required to execute oath as a condition to obtaining benefit). Even

---

[7] The voluntary nature of this choice has been upheld by federal courts that have considered the analogous Qualifying Statute under the MSA. *See Star Scientific, Inc. v. Beales*, 278 F.3d 339, 354 (4th Cir. 2002) (noting that manufacturer was free to join MSA "if it concluded that this would have been a better deal for it"); *S&M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604, 638 (M.D. Tenn. 2005) (MSA Qualifying Statute "leaves Plaintiffs no worse off financially than they would be under the MSA").

if an inherent value is relevant to the court's analysis, it is only in the context of whether that value imposes a burden. In other words, the Minnesota Supreme Court properly concluded under *Speiser* that CITMA is no worse off should it decide to pay 35 cents per pack because it decides the inherent value of its advertising and lobbying rights is greater than the inherent value of waiving those rights and paying 48 cents per pack. In short, there is no burden.

Third, CITMA cannot avoid consideration of the financial differences between its choices by inaccurately characterizing the terms of the Act. CITMA misrepresents the Act when it argues that the Act "effectively condition[s] the right of Appellants to retain their First Amendment rights upon the payment of the Tax on their products." Pet. Br. at 22. But *all* cigarette manufacturers pay *a fee* that reflects the costs attributable to the use of cigarettes, whether that fee is paid under the terms of a settlement agreement, or under the terms of the Act. *See* Minn. Stat. § 297F.24, subds. 1, 2. The amount of the fee depends on whether a settlement agreement exists, in which case a *higher fee* is imposed and advertising and lobbying rights are waived. Pet. App. at 9 (noting stipulated facts on per-pack fee for settlement versus non-settlement cigarettes).[8]

---

[8] For this reason, the decision in *Follett v. Town of McCormick*, 321 U.S. 573 (1944), is inapposite. The tax imposed there *increased* the taxpayer's cost of exercising his First Amendment freedom of religion. *Id.* at 574. Further, the Court noted that cases involving taxes on preachers' exercise of religious freedoms may require different standards than other First Amendment cases: "[S]ince they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants." *Id.* at 575 (citation omitted). Finally, this Court has recognized that *Follett* is limited to a flat license tax that operates

(Continued on following page)

CITMA is therefore wrong when it argues that the Act "exempts all cigarettes made by manufacturers who have waived their First Amendment rights." Pet. Br. at 24.

CITMA can neither ignore nor wish away the express terms of the Act. The Minnesota Legislature's clear and unambiguous purpose in imposing the fee was to "ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes." Minn. Stat. § 297F.24, subd. 1(b)(1). And, the State sought to pursue its "policy of discouraging underage smoking [without nonsettlement manufacturers undermining that policy] by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers." *Id.*, subd. 1(b)(2). Neither policy mentions advertising and lobbying rights.

Further, it is precisely because of these policies that the Minnesota Supreme Court properly considered the decisions of courts considering the Qualifying Statutes enacted following the MSA. *See* Pet. App. at 11-13. Regardless of the language differences between those statutes and the Minnesota Act, all of the States that settled legal claims and enacted statutes to address the marketplace response pursued similar goals: to avoid allowing underpriced cigarettes to undermine legitimate State concerns. Thus, CITMA's effort to characterize its competitive advantage as something other than unfair, Pet. Br. at 24-25, is unavailing. The Act is concerned with the significant price difference between settlement and nonsettlement

---

as a prior restraint on the free exercise of religious beliefs. *See Jimmy Swaggert Ministries v. Board of Equalization of California*, 493 U.S. 378, 389 (1990).

cigarettes, and the likelihood that that price difference will undermine the State's policies regarding smoking. *See* Minn. Stat. § 297F.24.[9] The Minnesota Supreme Court therefore properly considered the price difference between settlement and nonsettlement cigarettes in concluding that the Act does not represent an unconstitutional burden on CITMA's advertising and lobbying rights. CITMA's attacks are unfounded, fail to accurately represent the terms and nature of the Act, and do not support granting the Writ.

III. This Court Does Not Exercise Its Discretionary Jurisdiction Based On Speculative Assumptions About Possible Future Settlements or Laws That Are Not Before The Court.

For its last plea, CITMA urges this Court to grant its Petition because other unnamed courts could use the Minnesota Supreme Court's opinion to enforce similar statutes in MSA member states and could use that opinion to enforce as-yet unenacted legislation that could follow the possible initiation and possible settlement, on possibly similar terms, of similar future lawsuits against other industries. Pet. Br. at 26-27. Both grounds advance only

---

[9] For example, the price-elasticity of cigarettes – the extent to which a change in cigarette prices causes a change in demand – is far greater among young people than it is among adults. *See* Office of Smoking & Health, U.S. Department of Health & Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* 19, 337, 359 (2000). And, the lower price of nonsettlement cigarettes (without the Act's fee) means that a significant percentage of smokers were able to once again shift to the State the health-related costs of their smoking. *Id.* at 352-55. A copy of this Report is available at http://www.cdc.gov/tobacco/sgr/sgr_2000/FullReport.pdf.

supposition and speculation as to future events. Neither is a basis for this Court's exercise of its discretionary jurisdiction. *See* Sup. Ct. Rule 10.

While there are multiple reasons why this last plea does not support certiorari, the most obvious is that the plea for guidance in hypothetical future cases invites this Court to issue a wholly advisory opinion. This Court's refusal to wade into the murky arena of "what if" is so well-established that it needs no further elaboration. *See United Public Workers of America (CIO) v. Mitchell*, 330 U.S. 75, 89 (1947) (federal courts do not render advisory opinions; for "adjudication of constitutional issues, concrete legal issues presented in actual cases, not abstractions, are requisite.") (citations omitted). Speculation and hypotheticals about cases that are *not even filed*, or even if filed, may not be settled on terms CITMA envisions, are not the basis for certiorari jurisdiction. CITMA's Petition cannot be granted on this ground, and should therefore be denied.

CONCLUSION

For all the foregoing reasons, the Petition of the Council of Independent Tobacco Manufacturers of America should be denied.

Dated October 16, 2006

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

BRADFORD S. DELAPENA
Assistant Attorney General
RITA COYLE DEMEULES
(Counsel of Record)
Assistant Attorney General

445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 296-0692

Attorneys for Respondents the State of Minnesota and Dan Salomone in his Official Capacity as Commissioner of the Minnesota Department of Revenue

(3)

No. 06-371

Supreme Court, U.S.
FILED
OCT 27 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA,

Petitioner,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE, in his Official Capacity as the COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

REPLY BRIEF FOR PETITIONER

KARL E. ROBINSON
(*Counsel of Record*)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street,
Suite 3500
Minneapolis, MN 55402-4629
Telephone: (612) 604-6400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The Act Violates the First Amendment By Taxing Only Those Products Made By Manufacturers Who Refuse to Surrender Their First Amendment Rights and Exempting From the Tax Only Those Products Made By Manufacturers Who Surrender Their First Amendment Rights	1
II. Contrary to the State's Argument, the Unconstitutional Conditions Doctrine Is Not Limited to Circumstances Where the Law Has An "Improper Purpose" Or Is "Expressly Directed at Speech."	2
III. Contrary to the State's Argument, the Unconstitutional Conditions Doctrine Is Not Limited to Laws With An "Economic Coercion Element."	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

Dunn v. Blumstein, 405 U.S. 330 (1972) 7

Harman v. Forssenius, 380 U.S. 528 (1965) 7

Leathers v. Medlock, 499 U.S. 439 (1991) 2, 3

Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) 6, 7

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) 2, 3, 5

NAACP v. Alabama, 357 U.S. 449 (1958) 4

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 4, 7

Shapiro v. Thompson, 394 U.S. 618 (1969) 6, 7

Speiser v. Randall, 357 U.S. 513 (1958) 1, 2

STATUTE:

Minn. Stat. § 297F.24 ..... 4, 5

CONSTITUTIONAL PROVISION:

U.S. Const., Amend. I ..... *passim*

OTHER AUTHORITY:

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 7

ARGUMENT

I. The Act Violates the First Amendment By Taxing Only Those Products Made By Manufacturers Who Refuse to Surrender Their First Amendment Rights and Exempting From the Tax Only Those Products Made By Manufacturers Who Surrender Their First Amendment Rights.

The Act imposes the Tax on identical products based solely on whether the manufacturer has surrendered its First Amendment rights. The Act imposes the Tax on only those cigarettes manufactured by parties who have refused to surrender their First Amendment rights, while exempting cigarettes made by all parties who have surrendered their First Amendment rights. The State has never disputed these facts. Respondents' Br. at 6; Pet. App. at 37. However, the State argues the Act is nevertheless constitutional because it claims the Act "is not aimed at the suppression of speech, it does not reference speech, and it does not offer manufacturers a benefit in a manner calculated to coerce the surrender of speech." Respondents' Br. at 7. The State's arguments fail for several reasons.

Initially, the State concedes that "CITMA properly notes that the government may not condition a tax exemption on the renunciation of free speech rights. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958)." Respondents' Br. at 8. This concession is dispositive and establishes the Act is unconstitutional. It is undisputed that the Act conditions a tax exemption on the renunciation of free speech rights: The *only* way a cigarette manufacturer can obtain an exemption from the Tax imposed by the Act is to surrender certain of its fundamental First Amendment rights – including its rights to free speech, to access the courts and

to lobby its elected representatives. Thus, the Act violates the First Amendment by "condition[ing] a tax exemption on the renunciation of free speech rights," *Speiser*, 357 U.S. at 529, and the remainder of the State's arguments are irrelevant.

II. Contrary to the State's Argument, the Unconstitutional Conditions Doctrine Is Not Limited to Circumstances Where the Law Has An "Improper Purpose" Or Is "Expressly Directed at Speech."

Next, even if the remainder of State's arguments were relevant to determining the constitutionality of the Act, which they are not, each of these arguments fails. First, the State argues that "the unconstitutional conditions doctrine is applied only where a law has as its purpose the suppression of speech." Respondents' Br. at 8-10. The State is wrong.

The unconstitutional conditions doctrine is not limited to laws which have as their purpose the suppression of speech or other constitutional rights. This Court has long since "resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax [such as the Act] on First Amendment grounds: 'elicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Leathers v. Medlock*, 499 U.S. 439, 445 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Indeed, this Court explained more than four decades ago that the legislative purpose underlying a statute like the Act is irrelevant to determining whether the law violates the First Amendment under the unconstitutional conditions doctrine. "In *Speiser v. Randall*, 357

U.S. 513 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (emphasis added); *see also Minneapolis Star & Tribune*, 460 U.S. at 592 ("We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.").

As this Court explained in a subsequent case, the Minnesota tax law struck down in *Minneapolis Star & Tribune* was unconstitutional *despite* the fact that there was "*no evidence* of impermissible legislative motive in the case apart from the structure of the tax itself." *Leathers*, 499 U.S. at 445 (emphasis added). Instead, the structure of the statute and the improper burden on the taxpayer's First Amendment rights were more than sufficient to establish that the statute was unconstitutional. *Id.* This Court also stressed that the Minnesota tax "resembled a penalty for certain newspapers" since the tax applied only to a small group of newspapers, and that this type of tax "scheme" has a "potential for abuse" that violates the First Amendment. *Id.* at 446; *see also id.* at 447 ("A tax is also suspect if it targets a small group of speakers.").

Even assuming *arguendo* that the State is correct that a statute must have as its purpose the suppression of speech in order to violate the First Amendment under the unconstitutional conditions doctrine, the Act would still be unconstitutional. The language and structure of the Act itself establish that the Act is intended to tax only those products made by manufacturers who have refused to surrender their First Amendment rights through settlement agreements. In its definition of "nonsettlement

cigarettes," the Act expressly exempts from taxation all products made by manufacturers who have surrendered their First Amendment rights by specifically identifying the Minnesota Settlement Agreement in which the major tobacco companies relinquished such rights. Minn. Stat. § 297F.24, subd. 2; Pet. App. 5. In turn, the Act expressly imposes the Tax on only those products made by manufacturers who have refused to surrender their First Amendment rights by not agreeing to a settlement with "similar terms," *i.e.*, terms requiring the manufacturer to surrender certain of its First Amendment rights. Minn. Stat. § 297F.24; Pet. App. 9.

The State also argues that the "unconstitutional conditions doctrine is applied only where a law . . . is expressly directed at speech." Respondents' Br. at 8. Again, the State is wrong.

This Court has long held that statutes which do not expressly reference speech may violate the First Amendment. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (although "unintended," the abridgment of free speech rights "may inevitably flow from varied forms of government action" regardless of whether the law in question expressly references First Amendment rights). This Court has struck down state laws under the unconstitutional conditions doctrine when such laws burdened First Amendment rights even though the statutes made no reference to speech or any other First Amendment right. *See, e.g.*, *Sherbert*, 374 U.S. at 404 (statute violated First Amendment as an unconstitutional condition on government benefits "even though the burden may be characterized as being only indirect," and the statute made no reference to any First Amendment right).

Even if the State was correct that a statute must be "expressly directed at speech" to violate the unconstitutional conditions doctrine, which it is not, the Act would still be unconstitutional. The Act is framed in terms of speech and it references speech. In its definition of nonsettlement cigarettes, the Act expressly exempts from taxation products made by manufacturers who have surrendered their First Amendment rights by specifically identifying the Minnesota Settlement Agreement in which the major tobacco companies relinquished such rights. Minn. Stat. § 297F.24, subd. 2. In turn, the Act expressly taxes only those products made by manufacturers who have refused to surrender their First Amendment rights. *Id.* Thus, the State's claim that the Act's "distinction has nothing to do with which manufacturer has waived or not waived its First Amendment rights," Respondents' Br. at 12, is demonstrably wrong. Under the State's misguided logic, the unconstitutional Minnesota tax on ink and paper at issue in *Minneapolis Star & Tribune* was not a tax on speech, but on paper and ink. Of course, this Court correctly rejected such flawed reasoning and held that because the tax targeted select parties based on their First Amendment activities, it was unconstitutional. *Minneapolis Star & Tribune Co.*, 460 U.S. at 591-92. Similarly, in this case the Act is unconstitutional because it is imposed on select parties based on their refusal to surrender their First Amendment rights.

III. Contrary to the State's Argument, the Unconstitutional Conditions Doctrine Is Not Limited to Laws With An "Economic Coercion Element."

The State argues that the Act is constitutional and does not violate the unconstitutional conditions doctrine because the Act does not contain an "economic coercion element" and the Act does not "offer manufacturers a government benefit in a manner calculated to coerce the surrender of free speech rights." Respondents' Br. at 11, 13. Once again, the State is wrong.

There is no requirement under the unconstitutional conditions doctrine that the challenged statute contains an "economic coercion element" or that the law "coerces the surrender" of constitutional rights. This Court held more than thirty years ago that a plaintiff challenging a state law under the unconstitutional conditions doctrine does *not* have to show that it has been or will be coerced into surrendering its constitutional rights, nor must a plaintiff show that it has been or will be deterred from exercising its constitutional rights. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257-259 (1974).

In *Memorial Hospital*, this Court held that a statute which "operates to *Penalize* those persons who have exercised their constitutional right of interstate migration" is unconstitutional when it is not supported by a compelling government interest; the fact that no plaintiffs were deterred from exercising their constitutional rights or coerced into waiving their rights was irrelevant to this Court's analysis. *Id.* (emphasis and capitalization in original); *see also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (state statute held unconstitutional even though none of the plaintiffs were deterred from exercising their

constitutional rights or coerced into waiving their rights); *Dunn v. Blumstein*, 405 U.S. 330, 339-340 (1972) (no requirement that plaintiffs be deterred from exercising their constitutional rights or coerced into waiving their rights in order to strike down state statute under the unconstitutional conditions doctrine); *Sherbert*, 374 U.S. at 406 ("[T]o condition availability of [unemployment] benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties" regardless of whether she is or will be deterred from exercising such rights or coerced into waiving such rights). As this Court explained in *Dunn*, "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." 405 U.S. at 341 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)). Likewise, in analyzing this Court's unconstitutional conditions doctrine, one commentator has correctly noted that "the government did not use benefits to induce the surrender of [constitutional] rights in *Sherbert* or *Shapiro* as it did in *Speiser*," yet this Court still held the state statutes unconstitutional in *Sherbert* and *Shapiro* because the laws penalized plaintiffs for retaining or exercising their constitutional rights. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1435 (1989).

Thus, a state statue is unconstitutional under the unconstitutional conditions doctrine when the law penalizes a plaintiff for its retention or exercise of its constitutional rights, regardless of whether the law coerces the waiver of constitutional rights or deters the exercise of such rights. *Sherbert*, 374 U.S. at 406; *Memorial Hospital*, 415 U.S. at 257-259; *Dunn*, 405 U.S. at 339-340; *Shapiro*,

394 U.S. at 634. And that is exactly what the Act does in this case: CIMTA members are penalized for retaining their First Amendment rights because their products are subject to the Tax while their competitors' identical products are exempt from the Tax because their competitors have surrendered their First Amendment rights. Accordingly, the Act is unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KARL E. ROBINSON
(*Counsel of Record*)
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street,
Suite 3500
Minneapolis, MN 55402-4629
Telephone: (612) 604-6400

October 27, 2006